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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

ALTON T. TERRY,

Petitioner,

v.

TYSON FARMS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this damage action under the Packers and Stockyards Act (PSA), a poultry grower alleged that a live poultry dealer violated PSA regulations and 7 U.S.C. § 192(a) and (b) by not weighing the grower's production immediately upon its arrival at the dealer's plant, by denying his right to observe the weighing, and by terminating his contract because he complained to the Department of Agriculture. Subdivisions (a) and (b) of § 192 make it unlawful for any packer or live poultry dealer to engage in unfair, unjustly discriminatory or unreasonably prejudicial acts or practices with respect to transactions in livestock, meats or live poultry, but do not expressly refer to anticompetitive conduct. In contrast, subdivisions (c) through (f) of § 192 expressly enumerate anticompetitive acts. The district court dismissed the complaint on the ground that competitive injury must be pleaded to pursue a claim alleging violation of § 192(a) and (b). The court of appeals affirmed. The questions presented are:

1. Must injury to competition be pleaded and proved to establish liability for violation of § 192(a) and (b)?

2. In the alternative, assuming that § 192 is ambiguous, should the courts have deferred, under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–843 (1984), to Department of Agriculture decisions holding that § 192(a) and (b) does not require a showing of injury to competition?

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PETITION FOR A WRIT OF CERTIORARI

Alton T. Terry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit (Pet. App. 1a) is reported at 604 F.3d 272 (6th Cir. 2010). The Memorandum and Order of the United States District Court for the Eastern District of Tennessee (Pet. App. 33a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2010. Pet. App. 32a. A timely Petition for Rehearing En Banc was denied on June 23, 2010. Pet. App. 54a. Justice Thomas extended the time to file this petition to October 21, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

7 U.S.C. § 192(a) and (b) (2006), § 202(a) and (b) of the Packers and Stockyards Act, 1921, provides:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or . . . .

The full text of § 192 and other relevant portions of the Act are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner Alton T. Terry owned and managed a poultry farm in Tennessee,[1] where he raised broiler chickens for Tyson Farms, Inc. ("Tyson") until Tyson terminated his contract in 2006. Mr. Terry sued Tyson in federal district court under the Packers and Stockyards Act, 1921 ("PSA"), 7 U.S.C. § 181 et seq. (2006), and the Agricultural Fair Practices Act of 1967 ("AFPA"), 7 U.S.C. § 2301 et seq. He alleged that Tyson violated 7 U.S.C. § 192(a) and (b) by not weighing his production immediately upon arrival at Tyson's plant and denying his right to observe the weighing, contrary to PSA regulations, and by terminating his contract because he complained to the Department of Agriculture. The district court granted Tyson's motion to dismiss for failure to state a claim upon which relief could be granted. Pet. App. 33a. It held that Mr. Terry could not pursue his claims under

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[1] Mr. Terry has lost his farm to foreclosure.

either statute because: (1) the Tennessee Poultry Growers Association did not meet the AFPA's definition of an "association of producers,"[2] and (2) § 192's prohibition of "unfair, unjustly discriminatory, [and] deceptive practice[s]" and imposition of "undue or unreasonable prejudice" by poultry dealers applies only if the alleged violations injure competition. Pet. App. 38a, 47a. The Sixth Circuit affirmed.

A. The Packers and Stockyards Act, 1921

This case presents another chapter in the long struggle between those who grow our food and those who process and market it. That struggle has been conducted against the background of legislation enacted not only to protect competition and consumers, but also to protect farmers and ranchers from overreaching by economically powerful processors and marketers. Congress enacted the PSA in 1921. Pub. L. No. 67-51, 42 Stat. 159 (1921) (codified as amended at 7 U.S.C. § 181 et seq. (2006)). As described in this Court's first decision construing the PSA, the legislation was enacted: "to regulate the business of the packers done in interstate commerce and forbids them to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business." *Stafford v. Wallace*, 258 U.S. 495, 513 (1922) ("*Stafford*"). Although the Act has

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[2] This petition does not seek review of the dismissal of Mr. Terry's AFPA claim.

been amended some 23 times,[3] including a number of major revisions and expansions, its purpose remains as Chief Justice Taft described it in *Stafford*.

The 1921 Act consisted of four titles. Title I set forth definitions. Title II imposed general duties on "packers." Title III imposed public utility regulation on stockyards, including a duty to adopt just, reasonable and non-discriminatory practices (§ 307, 42 Stat. at 165 (current version at 7 U.S.C. § 208)). It also specifically declared unlawful the use of any unfair, unjustly discriminatory or deceptive practice in connection with stockyard operations by owners, marketing agencies and dealers, including practices relating to the weighing or handling of livestock. § 312, 42 Stat. at 167 (current version at 7 U.S.C. § 213). Persons injured by violations of § 307 and other specific provisions of Title III could either complain to the Secretary for administrative relief, or bring a suit for damages in a federal district court. § 308(a), 42 Stat. at 165 (current version at 7 U.S.C. § 209(a)). The statute expressly declared that existing common law and statutory remedies were preserved, and that the Act's administrative and judicial remedies were in addition to such remedies. § 308(b), 42 Stat. at 165 (current version at 7 U.S.C. § 209(b)). Congress also made clear that nothing contained in the PSA was to supplant the antitrust laws except as specifically provided. § 405, 42 Stat. at 168-69 (current version at 7 U.S.C. § 225).

The provision at issue in this case originated in § 202 of Title II, 42 Stat. at 161, and is now codified at

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[3] Subsequent amendments to the PSA are listed in the Appendix.

7 U.S.C. § 192.[4] The original provision made it unlawful for any "packer" to "(a) [e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or (b) [m]ake or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Subsections (a) and (b) made no reference to restraints of commerce, creation of a monopoly, or the manipulation or control of prices. In contrast, (c) through (f) of § 192 expressly rendered unlawful conduct that had the tendency, purpose or effect of restraining commerce or creating a monopoly or of manipulating or controlling prices. In 1921 this section could be enforced only by cease-and-desist orders of the Secretary of Agriculture, subject to review in the courts of appeals. §§ 203, 204, 42 Stat. at 161, 162-63 (codified as amended at 7 U.S.C. §§ 193, 194).

The 1921 Act extended to poultry, but limited its regulation to persons also engaged in the business of manufacturing or marketing livestock products.[5] That

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[4] Except as the context otherwise indicates, sections of the PSA are cited hereinafter by their section numbers in Title 7 of the U.S. Code.

[5] The 1921 Act defined the term "packer" to include "any person engaged in the business . . . of marketing . . . poultry [or] poultry products in commerce," but declared that "no person engaged . . . in such marketing business shall be considered a "packer" unless such person is also engaged in, owns, controls or has a 20 percent

limitation was modified in 1935, when Congress amended the PSA's coverage by adding Title V—Live Poultry Dealers and Handlers.[6] Section 501 of the 1935 amendment explained that live poultry markets in large population centers were "attendant with various unfair, deceptive and fraudulent practices and devices, resulting in the producers sustaining sundry losses and receiving prices far below the reasonable value of their live poultry in comparison with prices of other commodities . . . ," and that "[s]uch practices and devices are an undue restraint and an unjust burden upon interstate commerce . . . ." *Id.* at 648. Section 503 extended the provisions of § 192 to "live poultry dealer[s]," a term broadly defined to mean "any person engaged in the business of buying or selling live poultry in commerce for purposes of slaughter either on his own account or as the employee or agent of the vendor or purchaser." *Id.* at 649.

In subsequent amendments Congress responded to the substantial changes in the production, processing, and marketing of livestock and poultry that had occurred since 1921. The 1958 amendment, Pub. L. No. 85-909, 72 Stat. 1749 (1958), was a major updating of the Act's scope, regulatory remedies and enforcement. H.R. Rep. No. 85-1048 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212. Among other changes, § 192 was revised to expressly cover "poultry, or

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interest in the business of manufacturing or preparing livestock products. § 201, 42 Stat. at 160.

[6] Title V—Live Poultry Dealers and Handlers, Pub. L. No. 74-272, 49 Stat. 648 (1935), *repealed by* Poultry Producers Financial Protection Act of 1987, Pub. L. No. 100-173, § 10, 101 Stat. 917, 922 (1987).

poultry products." 72 Stat. 1749. The Agriculture Committee's report explained that the 1921 Act was not only intended to assure fair competition, but also "to safeguard farmers and ranchers from receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc." 1958 U.S.C.C.A.N. at 5213.

In 1976 Congress expanded the administrative and judicial remedies of 7 U.S.C. § 209(a), originally limited to enumerated sections, to encompass violation of "any of the provisions of this Act . . . relating to the purchase, sale, or handling of livestock . . . ." Pub. L. No. 94-410, § 6, 90 Stat. 1249, 1250 (1976). Poultry was not included at that time.

In the subsequent decades, the poultry sector saw dramatic restructuring, and significant new problems for poultry producers. Those problems led to amendment of the PSA by the Poultry Producers Financial Protection Act of 1987 ("Poultry Act"), Pub. L. No. 100-173, § 1, 101 Stat. 917 (1987). The Poultry Act was intended to adjust the PSA's market-facilitating protections for poultry growers to the large scale, integrated poultry production and processing industry that had developed in the Nation's agricultural economy. H.R. Rep. No. 100-397, at 6 (1987), *reprinted in* 1987 U.S.C.C.A.N. 855, 856.

In addition to defining key terms related to poultry production, the Poultry Act established a trust to protect poultry growers in the event of poultry dealer insolvency, required prompt contractual payment of poultry producers, and clarified the Federal Trade Commission's jurisdiction over certain poultry

marketing practices. Further, the Poultry Act finally extended to poultry sellers and growers § 209's federal judicial remedy for violation of "any of the provisions of this Act." Poultry Act § 5, 101 Stat. at 918; *see* 1987 U.S.C.C.A.N. at 855.

Section 209(a) of the PSA, as amended by the Poultry Act, now provides that:

> If any person . . . violates any of the provisions of this chapter, or of any order of the Secretary under this chapter, relating to the purchase, sale, or handling of livestock, the purchase or sale of poultry, or relating to any poultry growing arrangement or swine production contract, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

7 U.S.C. § 209(a). Although § 209(b) provides that liability under subsection (a) can be remedied by a complaint to the Secretary or an action in federal district court, subsection (b) remains limited to the livestock sector as provided by § 210. Thus, a poultry grower's only remedy for violations of § 192 by a live poultry dealer such as Tyson is by a complaint in

federal district court.[7] Mr. Terry pursued that remedy in this case.

Currently, § 192(a) makes it unlawful for any live poultry dealer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device." 7 U.S.C. § 192(a). Section 192(b) makes it unlawful for any live poultry dealer to "[m]ake or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect." 7 U.S.C. § 192(b). Subsections (c) through (f) of § 192 prohibit conduct having the purpose, tendency, or effect of restraining commerce, manipulating or controlling prices, or creating a monopoly. 7 U.S.C. § 192(c)-(f).

In 2002, the Act was again amended to prevent processors from including in production contracts confidentiality provisions that barred livestock and poultry producers from discussing the terms or details of their contracts with federal and state agencies, legal advisers, lenders, accountants, executives or

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[7] In addition to the protections afforded by amended § 209, the Poultry Act amended § 228a of the PSA to authorize the Secretary of Agriculture ("Secretary") to apply to the appropriate district court (via the Attorney General) for a temporary injunction or a restraining order "[w]henever the Secretary has reason to believe that any person . . . has failed to pay any poultry grower what is due on account of poultry obtained under a poultry growing arrangement . . . ." 7 U.S.C. § 228a. The Poultry Act also provided the Department of Agriculture's Packers and Stockyards Administration with the authority to enforce the prompt payment and trust provisions of the legislation against poultry dealers. 7 U.S.C. § 228b-1, b-2, b-4.

managers, landlords or members of their immediate family. Pub. L. No. 107-171, § 10503, 116 Stat. 509, 510 (2002) (codified at 7 U.S.C. § 229b (2006)).

In § 11006 of the Food, Conservation, and Energy Act of 2008, Congress directed the Secretary of Agriculture to promulgate regulations "to establish criteria that the Secretary will consider in determining . . . whether an undue or unreasonable preference or advantage has occurred in violation of" the PSA. Pub. L. No. 110-246, 122 Stat. 1651, 2120 (2008). The Secretary issued proposed regulations on June 22, 2010. Among other things, the regulations would formalize the Department of Agriculture's "longstanding" position that a violation of § 192(a) or (b) "can be proven without proof of predatory intent, competitive injury, or likelihood of injury." Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338, 35,340 (June 22, 2010).

B. The Economic Organization of Broiler Production

Large poultry "integrators" such as Tyson control most of the variables relevant to the poultry growing process. The United States Department of Agriculture ("USDA") has succinctly described the current organization of this sector of the agricultural economy:

> Broiler production is organized in a distinctive manner. Most farms are linked to an integrator through a production contract, under which the integrator provides chicks, feed, veterinary services, and other inputs to the

> farmer, who grows the birds to market weight. Besides providing their own labor, farmers invest in specialized poultry housing (along with associated equipment), pay for any hired labor, and bear some or all of the cost of utilities. Because broiler housing is specialized and long-lived, the decision to produce broilers is a long-term commitment, and most producers have worked with their integrator for at least 10 years.[8]

The "[i]ntegrators usually own hatcheries, feed mills, slaughter plants, and further processing plants—that is, they may be vertically integrated into all stages except for broiler production, where they rely on networks of growers assembled through production contracts."[9] The growers, in turn, must make a major investment in the broiler houses in which the chicks supplied by the integrator are grown for processing. A 30,000 square-foot house cost $300,000 in 2006, and most growers must operate more than one.[10] Moreover, the USDA has found that "[b]ecause production occurs in localized networks, growers in most areas have very few integrators . . . in their area and most have no more than three."[11] *See also London*

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[8] USDA Economic Research Service, James M. McDonald, *The Economic Organization of U.S. Broiler Production,* at 2 (June 2008), *available at* http://www.ers.usda.gov/Publications/EIB38/EIB38.pdf.

[9] *Id.* at 3.

[10] *Id.* at 7.

[11] *Id.* at 4.

v. Fieldale Farms Corp., 410 F.3d 1295, 1298-99 (11th Cir. 2005) ("*London*").

Growers are paid according to a formula that assesses the weight gained by the chickens relative to the amount of food provided. The weight of the chickens is therefore a critical factor in grower compensation. Pet. App. 60a. USDA regulations issued under the PSA require that weighing take place immediately upon the delivery of chickens to the dealer's plant, and require that growers be allowed to watch the weighing and obtain any information pertaining to the weight. 9 C.F.R. §§ 201.82(b), 201.108-1(e)(4) (2010). Delayed weighing can be devastating to a grower's payment because shrinkage occurs rapidly. The grower then loses the full value of his efforts and is also discriminatorily disadvantaged in comparison to growers whose birds are timely weighed.

C. Factual Background

Mr. Terry's complaint alleged that he purchased his poultry farm in 2001, after being assured by the production manager at the Shelbyville complex of Tyson Farms, Inc. that the farm was a top producing poultry farm and that the facility and equipment were in excellent condition and suitable for growing chickens. The Tyson manager's assurances led Mr. Terry to believe that the farm's poultry equipment would need no major improvements in the near-term.

Upon assuming control of the farm, Mr. Terry alleged, he began to learn about problems poultry growers were experiencing with Tyson and similar poultry dealers. Mr. Terry became actively involved in

organizing the poultry growers in his area into the Tennessee Poultry Growers Association ("TPGA"). As the elected chairman of the directors of the TPGA, Mr. Terry informed growers of their rights under federal law and reported complaints about Tyson's practices to officials at the Grain Inspection, Packers & Stockyards Administration ("GIPSA") in Washington, D.C. Pet. App. 5a-6a.

Concerned that his own chickens were not being weighed immediately upon delivery to Tyson as required by law and his contract, Mr. Terry made multiple attempts to watch the weighing at the plant. After being denied access to the plant in August and December of 2004, Mr. Terry notified a federal official and requested that Tyson be sent a letter. On February 13, 2005, the weighing of his production was delayed; he asked to observe the weighing of his birds at the Tyson plant, but was denied access. Mr. Terry called an official of GIPSA, who said that he was en route to the plant to investigate. That week, Tyson "delayed" placement of chickens with Mr. Terry for a full flock rotation, costing Mr. Terry $30,000 in lost compensation. The following month, Tyson informed Mr. Terry that the company had decided to discontinue placement of chickens at his farm after he made the weighing complaint. Mr. Terry requested and was denied compensation for the missed flock. Tyson subsequently terminated Mr. Terry's contract, citing his confrontational behavior towards Tyson's representatives and his failure to make costly upgrades to the equipment on his farm. At the time of the termination, Mr. Terry was well above average in the poultry grower rankings. Mr. Terry subsequently put his farm on the market, but was unable to sell it due to Tyson's insistence that expensive upgrades be

made before birds will be placed at the farm. Pet. App. 7a.

D. Court Proceedings and Decisions

On January 7, 2008, Mr. Terry sued Tyson under § 209 in the U.S. District Court for the Eastern District of Tennessee. He alleged: (1) Tyson violated the Agricultural Fair Practices Act ("AFPA"), 7 U.S.C. § 2301 et seq., by discriminating against Mr. Terry because of his membership in an association of producers; and (2) Tyson violated § 192(a) and (b) of the PSA by engaging in "unfair, unjustly discriminatory, or deceptive practice[s]" and by subjecting Mr. Terry to "undue or unreasonable prejudice or disadvantage." 7 U.S.C. § 192(a) and (b).

The district court granted Tyson's Motion to Dismiss for failure to state a claim upon which relief could be granted. It dismissed Mr. Terry's claim under the PSA on the ground that a plaintiff seeking judicial relief under § 209 for a violation of § 192(a) and (b) must not only allege injury from conduct prohibited by those provisions, but must also allege that the defendant's actions adversely affect the pricing of poultry or overall competition in the poultry industry. Noting that the question of whether § 192(a) and (b) requires a showing of competitive impact had not been decided by the Sixth Circuit, the district court chose to follow the holdings of several other circuits that require an allegation of competitive injury. The district court also ruled that policy considerations support such a requirement, lest dealers be subjected to liability under the PSA for simple breach of contract or "justifiable termination" of a poultry grower for failure to perform its contract. Pet. App. 50a.

On Mr. Terry's appeal, the United States filed a brief amicus curiae setting forth the Department of Agriculture's longstanding position that § 192(a) and (b) does not require allegation or proof of an adverse effect on competition. The Sixth Circuit, however, affirmed the judgment of the district court. In a brief discussion, it agreed that whether competitive injury must be alleged under § 192(a) or (b) of the PSA was a question of first impression in the Circuit. It held that seven other circuits had read the PSA to require a showing of competitive injury when § 192(a) or (b) is invoked. It also recited its obligation to make an independent examination of the issue. Its decision, however, rested upon its determination that it should maintain harmony with its sister circuits. Without analyzing the language of § 192, it concluded that:

> under the fundamental principle of stare decisis, we deem the construction of this nearly 90-year-old statute to be a matter of settled law. We therefore join these circuits and hold that in order to succeed on a claim under §§ 192(a) and (b) of the PSA, a plaintiff must show an adverse effect on competition.

Terry, 604 F.3d at 279, Pet. App. 1a. Mr. Terry's petition for rehearing en banc was denied. Pet App. 54a.

REASONS FOR GRANTING THE PETITION

I. Introduction

In the PSA, and in subsequent amendments, Congress had three principle objects: (1) to assure fair competition in the marketing of meat and poultry

products; (2) to protect producers from abuses that deny them access to open, fair and efficient markets in the meat and poultry industries; and (3) to provide for meaningful administrative or judicial damages for those injured by such abuses. By expressly stating in the statute which provisions deal with competition, and which with unfair or deceptive practices, Congress made clear that it intended the PSA to be "more than a mirror of the antitrust laws.", *Spencer Livestock Commission Co. v. Department of Agriculture*, 841 F.2d 1451, 1455 (9th Cir. 1988) ("*Spencer Livestock*").

Poultry growers in the United States produce some 42 billion pounds of poultry meat, of which four-fifths is from broilers grown under production contracts with large integrators like Tyson. Most of the $20 billion farm value of U.S. poultry comes from broiler production.[12] The legal foundation for this enormous sector of the agricultural economy is the production contract by which individual poultry farmers are bound to the integrators.

Successive Secretaries of Agriculture have ruled that proof of competitive injury or general harm to consumers is sufficient but not necessary to establish an unfair or deceptive practice under the PSA. Statement at 10. This understanding is based on the plain language of 7 U.S.C. § 192(a) and (b), and similar language in §§ 208 and 213. Yet the Sixth Circuit has disregarded fundamental rules of statutory construction, the amicus brief of the United States

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[12] USDA Economic Research Service, Briefing Room: *Poultry and Eggs: Background* (Apr. 16, 2009), *available at* http://www.ers.usda.gov/Briefing/Poultry/Background.htm.

presenting the Secretary's construction of the statute he administers, and the Ninth Circuit's conflicting construction in *Spencer Livestock*. Instead, it has read into § 192(a) and (b) a requirement for alleging and proving injury to over-all competition that is not there. Eschewing any effort to provide an independent explanation of its analysis, it has simply adopted the views of other circuits. Those circuits have found ambiguity in the face of plainly expressed Congressional intent, asserted that such ambiguity "meant it was left to the courts to determine what anti-competitive practices could be unfair, unjustly discriminatory or deceptive,"[13] and over-ridden the Secretary of Agriculture's construction on the basis of their own policy preferences.[14]

The result is a complete frustration of Congress's efforts to protect farmers and ranchers from unfair, prejudicial or deceptive practices by the agri-businesses to which they deliver their production. The Sixth Circuit's ruling, like the decisions of circuits treading the same path, particularly impacts poultry growers. Growers injured by unfair or deceptive practices of the integrator-party to their production contracts can almost never show that abuses inflicted upon them individually will broadly impact competition or consumer prices. The decision of the Sixth Circuit and the courts it follows effectively nullifies the federal judicial remedy under § 209 that

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[13] *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 359 (5th Cir. 2009) (en banc) ("*Wheeler*"), describing *Been v. O.K. Indus.*, 495 F.3d 1217 (10th Cir. 2007).

[14] *See id.* at 371-75 (Garza, Cir. J., dissenting from the 9-7 en banc decision).

Congress provided in 1987. Poultry growers have no other damage remedy for integrators' abusive practices because § 209(b)'s option of seeking damages in proceedings before the Secretary of Agriculture is limited by § 210(a) to provisions of the PSA relating to commerce in livestock. Because the localization of integrator networks typically makes the integrators local monopsonists (Statement at 10-11), and because poultry growers must make substantial investments to enter and perform production contracts, they are effectively at the mercy of the integrators. As a recent study notes, "[i]t is well known in the chicken industry that producers dare not speak out against integrators."[15] The results in this case and its predecessors in other circuits have thus reinforced the imbalance between growers and integrators that Congress sought to redress in the PSA.

Even if, contrary to Petitioner's contentions, the unfair practice provisions of the PSA are ambiguous, the familiar principle of deference enunciated in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984) ("*Chevron*"), should apply to the Secretary's construction. Any other approach leads to inconsistent and anomalous results.

For example, under the Sixth Circuit's ruling, a poultry grower suing for damages in district court resulting from delayed, deceptive or concealed weighing of delivered broilers, in violation of § 192(a) and (b), must also show that such misconduct is

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[15] David A. Domina & C. Robert Taylor, *The Debilitating Effects of Concentration Markets Affecting Agriculture*, 15 Drake J. Agric. L. 61, 100 (2010) (footnote omitted).

harming competition or consumers generally. Otherwise it cannot be remedied. On the other hand, a livestock producer complaining to the Secretary of unfair and deceptive weighing in violation of § 213(a) need not make such a showing because the Secretary,[16] and the Ninth Circuit in *Spencer Livestock,* have correctly perceived that the PSA's unfair practice provisions do not require such a showing.

The Sixth Circuit's conflicting standard also is anomalous because it attributes to Congress an intent to allow deceptive weighing practices in the poultry sector. This conclusion is inconsistent with the PSA as originally enacted, and the entire course of subsequent amendments, which have provided increased federal protection for farmers and ranchers as food production and its attendant abuses have changed.

The Sixth Circuit's insertion into § 192(a) and (b) of an unenacted competitive injury requirement devastatingly impacts implementation of the PSA in the poultry sector. That huge slice of agricultural production is showing increasing trends toward concentration, and thus ever increasing power over growers by large integrators like Tyson.[17] This Court

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[16] *In re Ozark Cnty. Cattle Co.*, 49 Agric. Dec. 335, 365 (1990). Accord, e.g. *In re Rodman*, 47 Agric. Dec. 885, 912 (1988); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 742 (1988); *In re White*, 47 Agric. Dec. 229, 276 (1988); *In re Corn State Meat Co., Inc.*, 45 Agric. Dec. 995, 1023 (1986); *In re ITT Cont'l Baking Co.*, 44 Agric. Dec. 748, 781 (1985).

[17] The Government Accountability Office has identified a trend toward increased concentration in broiler production as measured by the market share of the four largest food processing firms. In

should decide whether the courts can turn the PSA into "nothing more than a mirror of the antitrust laws"[18] despite § 192's clear provisions specifying when competitive impact is a element of a violation and when it is not.

II. Proof of Injury to Competition is Not a Necessary Element of a Violation of 7 U.S.C. § 192(a) and (b).

Three established principles inform the construction of § 192(a) and (b). First, a "legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain,* 503 U.S. 249, 254 (1992). Second, "'[w]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Carcieri v. Salazar,* 129 S. Ct. 1058, 1065 (2009); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)) (citation omitted). *A fortiori*, this principle applies when the disparate exclusion and inclusion are only lines away from each other in different subdivisions of the same section. Third, "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) (citation omitted).

1982 that ration was 27 percent. By 2006 it was 57 percent. GAO-09-746R Concentration in Agriculture, at 18 (June 30 2009), *available at* http://www.gao.gov/new.items/d09746r.pdf.

[18] *Spencer Livestock*, 841 F.2d at 1455.

The complaint in this case invokes § 192(a) and (b). Section 192 divides the practices it condemns into seven disjunctive subdivisions enumerated (a) through (g). Its opening sentence provides: "It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to [carry out any of the seven practices]." § 192. Subdivisions (a) and (b) thus make it unlawful for a live poultry dealer to:

> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or . . . .

Id. at § 192(a) and (b). Nothing in subdivisions (a) and (b) expressly makes effects on competition a required element of the offense, although some forms of the conduct condemned may harm competition and thus be within the scope of these subdivisions. In contrast, subdivisions (c), (d), (e), and (f) explicitly refer to anticompetitive conduct:

> (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or

with the effect of apportioning the supply between any such persons, **if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or**

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article **for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce**; **or**

(e) Engage in any course of business or do any act **for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or**

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) **to manipulate or control prices; or . . . .**

Id. at § 192(c)-(f) (emphasis added). Subdivision (g) addresses agreements to engage in, or abet conduct condemned in five of the preceding subdivisions:

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing

> of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

Id. at § 192(g).

Because the subdivisions are set forth in the disjunctive, they provide for and describe seven separate and independent unlawful practices. Each subdivision unambiguously specifies the necessary elements of the act or practice which is rendered unlawful under the opening sentence of § 192. By making defined anticompetitive conduct a clearly expressed element of an unlawful practice under subdivisions (c), (d), (e), and (f), Congress itself conclusively established that in the food industries covered by § 192, competition is harmed when the acts covered by those subdivisions are proven. Such anticompetitive acts are violations of the subdivisions in which they appear. Subdivisions (a) and (b) contain no similar proscription of specified anticompetitive conduct, or indeed, any other reference to competition. The contrast between subdivisions (a) and (b) on the one hand and subdivisions (c) through (f) is stark. Indeed, if subsections (a) and (b) already include a requirement of injury to competition, then the references to anticompetitive conduct in subdivisions (c) through (f) are completely superfluous. *Wheeler,* 591 F.3d at 375 (Garza, Cir. J., dissenting). The controlling principles of statutory construction described above leave no room for the Sixth Circuit's conclusion that Congress intended to make competitive injury an indispensable element of subdivisions (a) and (b).

The Sixth Circuit did not attempt to explain how, in the face of § 192's plain language and structure,

only injuries from unfair and deceptive practices that adversely affect competition can be remedied under subdivisions (a) and (b). Instead, it concluded that seven other circuits "unanimously" so construed the statute[19] and that it should join them in the interests of avoiding conflicts, respecting stare decisis and insuring predictability. Pet. App. 8a. This analysis is flawed because it misreads and miscounts the holdings of the cases cited.[20] It also fails to recognize the Ninth Circuit's conflicting decision in *Spencer Livestock*, which ruled that proof of an anticompetitive effect is not required under § 213's prohibition of unfair and deceptive practices in the livestock sector. 841 F.2d at 1455-56. Section 213 closely parallels § 192(a) and (b). The analysis is also flawed because only three of the cited cases attempted any sort of independent

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[19] *Wheeler*, 591 F.3d at 362-63; *Been v. O.K. Indus.*, 495 F.3d 1217 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London*, 410 F.3d at 1303, *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. Oct. 5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); and *Pac. Trading Co. v. Wilson & Co., Inc.*, 547 F.2d 367, 369-70 (7th Cir. 1976).

[20] Judge Garza's dissent in *Wheeler* shows that only four of the circuits cited have issued published opinions holding that a plaintiff injured by conduct in violation of § 192(a) or (b) must also prove an injury to competition: *Wheeler*, 591 F.3d 355 (5th Cir. 2009), *Been*, 495 F.3d 1217 (10th Cir. 2007), *London*, 410 F.3d 1295 (11th Cir. 2005), and *Pac. Trading Co.*, 547 F.2d 367 (7th Cir. 1976).

analysis.[21] But of greater significance is the fact that none of the decisions followed by the Sixth Circuit confront the plain language of the statute. Rather, they rest on a policy choice constructed from parts of the legislative history of the original PSA and selected amendments. Such a choice is beyond the proper role of Article III courts. *See Wheeler*, 591 F.3d at 379-80 (Garza, Cir. J., dissenting).

This Court's decision in *Stafford* reviewed the history of the 1921 enactment in determining that Congress's imposition of regulation on stockyard commission merchants and dealers in the PSA was constitutional under the Commerce Clause. The Court recognized that in the PSA Congress sought to remedy the effects of monopolization and collusion in the livestock industry revealed in the Federal Trade Commission's 1918 report on the industry, in committee hearings, and in antitrust proceedings against the major meatpackers of the day. Nothing in the decision, however, held that these evils defined the limits of every provision of the Act or that anticompetitive conduct was the only evil to which those provisions could be applied.

Subsequent amendments revealed a continuing course of expanding market facilitating protections for farmers and ranchers based upon the amending Congress's understanding of the purposes of the PSA. As noted above, one of the evils addressed by the 1935 amendments was widespread fraud practiced by dealers against poultry producers. Statement at 5-6.

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[21] *Wheeler*, 591 F.3d 355; *London*, 410 F.3d 1295; *Pickett*, 420 F.3d 1272.

In 1958, the prohibition of unfair or deceptive practices in § 192 was amended to include live poultry dealers. *Id.* at 6-7. The 1958 amendment also directed the Secretary to establish a separate unit to administer and enforce Title II of the Act, which includes § 192. 72 Stat. at 1751. These provisions were enacted on the understanding that although the PSA's primary purpose was to assure fair competition, it was also intended to assure open and reasonable trade practices to facilitate accessible, fair, and economically efficient markets for farmers and ranchers, as well as consumers. Statement at 7-8. "[T]he PSA is a remedial statute . . . to be 'construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen.'" *Been v. O.K. Industries, Inc.*, No. 08-7078, 2010 U.S. App. LEXIS 21131, at *24-25 (10th Cir. 2010).

The same understanding underlay the 1987 amendments, which provided extensive financial protection for poultry producers, and granted them a judicial remedy in federal district court to recover damages for violation of any provision of the Act. Statement at 7-8. The 2002 amendments likewise expanded producer protections. They were intended to correct abusive confidentiality requirements that had become widespread in contracts between processors and producers of livestock and poultry. Statement at 9-10. In limiting such provisions, Congress granted producers a federally enforceable right to discuss details of their contracts with government agencies, legal advisers, lenders, accountants, executives and managers of a party, landlords and members of their immediate family. 7 U.S.C. § 229b(b).

The long list of amendments described above are not ordinary legislative history; they are a chain of enacted legislation that reflects the intent of Congress in the PSA as it stands today. The Sixth Circuit's ruling perpetuates a gross misreading of that intent. Contrary to that misapprehension, Congress has deemed the PSA's unfair practice provisions to be so central to its purpose to protect producers that it has declared particular acts, such as false weighing (§ 213) and failure to promptly pay poultry producers (§ 228b(c)) to be unfair practices. Yet, under the construction of the PSA in the decisions the Sixth Circuit has adopted, such false weighing or untimely payment cannot be remedied by the Secretary or the Courts because such practices do not impact the market as a whole "despite an unfair effect on the plaintiffs." *Wheeler,* 591 F.3d at 360.

The courts that created this restriction trace it to the original 1921 Act, which they construe to be rooted solely in the market competition protected by the antitrust laws. *E.g.*, *Wheeler*, 591 F.3d at 360-64. In effect, those courts have imported into the PSA the concepts of antitrust injury necessary to establish standing in private antitrust actions. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). The PSA, however, is not an antitrust law and its provisions do not affect the antitrust laws except as specifically provided. § 405, 42 Stat. at 168-69 (codified as amended at 7 U.S.C. § 225). Moreover, when Congress provided judicial and administrative remedies for individuals injured by violations of any of the PSA's provisions, it made clear that those remedies were in addition to, and thus independent of, existing common law and statutory remedies. § 209(b). Thus, a finding that the PSA has been violated does not in

itself supply a basis for antitrust liability. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Since nothing in § 192(a) and (b) refers to those laws or to competitive injury, there is no basis whatsoever to make such injury an element of liability to individuals damaged by the unfair or deceptive practices those subdivisions make unlawful.

The courts requiring a showing of competitive injury also compare the PSA to the Federal Trade Commission Act ("FTCA"), which declares unlawful "unfair methods of competition" and "unfair or deceptive acts and practices" in or affecting commerce. 15 U.S.C. § 45(a) (2006). The term "unfair methods of competition" as used in the FTCA necessarily requires a showing of an impact on market competition, not merely on competition between rival sellers. *FTC v. Klesner*, 280 U.S. 19 (1929). The term "unfair or deceptive acts and practices" in the FTCA requires a showing that the questioned act or practice "causes or is likely to cause substantial injury to consumers . . . ." 15 U.S.C. § 45(n).

In contrast, § 192(a) of the PSA bars "any unfair, unjustly discriminatory, or deceptive practice or device" without reference to competition. Section 192(b) bars subjecting "any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect" whatsoever without reference either to competition or consumers. Further, § 45(a) of the FTCA is enforced solely through complaints issued by the Federal Trade Commission seeking cease-and-desist orders, and provides no private cause of action to injured individuals. The PSA provides both administrative and judicial damage remedies for

unfair or deceptive acts and practices. § 209. In sum, the PSA declares unlawful a range of unfair or deceptive acts and practices without the limitations contained in the FTCA; in contrast to the FTCA, the PSA provides a private cause of action to any person injured by such acts and practices; and permits such injured persons to recover damages, which the FTCA does not. There is no basis, therefore, to restrict § 192(a) and (b) by the limitations on unfair methods, acts and practices contained in the FTCA.

III. In the Alternative, the Sixth Circuit Should Have Accorded *Chevron* Deference to the Secretary's Consistent Position that § 192(a) and (b) Does Not Require a Showing of Injury to Competition.

For the reasons set forth above, § 192 clearly and unambiguously means that Congress did not require complainants invoking subdivisions (a) and (b) to plead and prove injury to competition. That construction coincides with the Secretary's well-established rulings to the same effect. It is also confirmed under the first step of *Chevron,* 467 U.S. at 842-43: where "Congress has directly spoken to the precise question at issue. . . . [and] the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress." *Id.*

Assuming, however, that § 192 is ambiguous as to whether competitive injury is a necessary element of liability under subdivisions (a) and (b), then the Secretary's interpretation should be given deference by the courts under Chevron's second step:

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843 (footnotes omitted).

It may be objected that *Chevron* is inapplicable here because the Secretary has no authority to enforce § 192 in the context of poultry production. *London*, 410 F.3d at 1304. He can, however, enforce the PSA's unfair practice provisions in the livestock context pursuant to §§ 209, 210 (complaints for damages for any violation of the act) and 213 (prevention of unfair, discriminatory or deceptive practices by stockyard owners, market agencies and dealers). Indeed, a violation of § 213 is also a violation of § 192(a). *De Jong Packing Co.*, 618 F.2d at 1336-37.

Failure to apply *Chevron* to the construction § 192(a) and (b) simply because those provisions are invoked in an action involving poultry instead of livestock would institutionalize conflict between the courts and the Secretary over the interpretation of the same statutory language. Such a result is not consistent with the principles of *Chevron* or the structure of the PSA. Therefore *Chevron* Step 2 applies to the Secretary's longstanding interpretation of the unfair practice provisions of the PSA whether they are invoked in a livestock case or a poultry case.

In applying Step 2 to the Secretary's interpretation, the contrary rulings of the courts cited by the Sixth Circuit are not controlling because none of those decisions analyzed § 192's language and structure.

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . . [A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's.

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 982 (2005). Such a restriction would be contrary to Chevron's fundamental principle. *Id.* at 982-83.

The Secretary's construction is reasonable, and therefore permissible. It fits tightly into § 192's language, structure and purpose to prevent unfair and deceptive acts and practices in the industries regulated by the PSA, particularly with respect to core conduct involving the weighing of meat and poultry.

IV. The Questions Presented are of National Importance to the Production of Meat and Poultry in the United States

The decision of the Sixth Circuit is the latest in a string of rulings that has frustrated Congress's

continuing effort to protect meat and poultry producers from abusive behavior by large packers and dealers. In the poultry sector the damage remedy enacted for "any" (§ 209(a)) violation of the Act has become an empty promise. Five of the poultry cases cited by the Sixth Circuit as requiring a showing of injury to competition were decided after passage of the Poultry Act.[22] But the frustration of Congress's intent is not confined to poultry production. It extends as well to the even larger livestock industry. In 2009, beef and cattle products accounted for 26.07 billion pounds valued at $31 billion. Four of the cases relied on by the Sixth Circuit involved the livestock sector.[23] Similarly affected is the huge hog and pork industry, which has seen a substantial increase in the use of production contracts since 1992.[24] In 2002, Congress recognized this development by including swine contractors in § 192. Pub. L. No. 107-171, § 10502(b)(1), (b)(2)(A), 116 Stat. at 509.

In the hope that the courts will reconsider the issue, the Secretary is now considering a proposed regulation that would codify the position to which he and his predecessors have long and consistently adhered—that competitive injury is a sufficient, but

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[22] *Wheeler*, 591 F.3d 355; *Been*, 495 F.3d 1217; *London*, 410 F.3d 1295; *Philson*, 1998 WL 709324; *Jackson*, 53 F.3d 1452.

[23] *Pickett*, 420 F.3d 1272; *IBP, Inc.*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong Packing Co.*, 618 F.2d 1329.

[24] *See* USDA Economic Research Service, Nigel Key & William McBride, *The Changing Economics of U.S. Hog Production*, at 7-8, (Dec. 2007) *available at* http://www.ers.usda.gov/Publications/ERR52/ERR52.pdf.

not a necessary element of the PSA's unfair practice provisions. Statement at 10. Even if that proposal is adopted, however, it is unlikely that the courts requiring competitive injury will reconsider, because they base their holdings not on the language of the PSA, but on a misreading of its legislative history, a mistaken application of stare decisis, and policy concerns over predictability and economic efficiency. It is difficult to understand how there can be a predictability or efficiency interest in the imposition of unfair or deceptive practices on agricultural producers. For the courts requiring competitive injury, the position the Secretary proposes to codify has been conclusively rejected both in damage suits brought by producers and on judicial review of the Secretary's remedial orders. There is no reason, therefore, for this Court to await the possible promulgation and judicial review of the proposed regulation. The Department of Justice presented the justifications for the Secretary's position to the Sixth Circuit and to the Fifth and Eleventh Circuits as well[25] in briefs amicus curiae authorized by the Solicitor General. The Court may therefore wish to invite the views of the United States as to whether it should grant certiorari in this case. Whether the Court does so or not, the persistent misconstruction of the PSA involved in this case merits review and correction by this Court.

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[25] *Wheeler*, 591 F.3d 355; *London*, 410 F.3d 1295; *Pickett*, 420 F.3d 1272.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-5577

[Filed May 10, 2010]

ALTON T. TERRY, *Plaintiff-Appellant,* v. TYSON FARMS, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Eastern District of Tennessee at Winchester. No. 08-00003—Harry S. Mattice, Jr., District Judge.

Argued: March 4, 2009

Decided and Filed: May 10, 2010

Before: NORRIS, COOK, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Cynthia Noles Johnson, JOHNSON LAW, P.C., Cohutta, Georgia, for Appellant. Jay T. Jorgensen, SIDLEY AUSTIN LLP, Washington, D.C., for Appellee. Jonathan H. Levy, UNITED STATES DEPARTMENT OF JUSTICE, Washington, DC, for Amicus Curiae. **ON BRIEF:** Cynthia Noles Johnson, JOHNSON LAW, P.C., Cohutta, Georgia, Russell D. Hedges, MOORE & HEDGES, Tullahoma, Tennessee, for Appellant. Jay T. Jorgensen, Carter G. Phillips, SIDLEY AUSTIN LLP, Washington, D.C., Travis R. McDonough, Roger W. Dickson, Zachary H. Greene, MILLER & MARTIN PLLC, Chattanooga, Tennessee, for Appellee. Jonathan H. Levy, Michael S. Raab, UNITED STATES DEPARTMENT OF JUSTICE, Washington, DC, for Amicus Curiae.

OPINION

GRIFFIN, Circuit Judge. Plaintiff Alton T. Terry, a Tennessee poultry farmer, entered into a contract with defendant Tyson Farms, Inc., the nation's largest poultry processing firm, to raise chickens. The present action evolved from purportedly unlawful retaliatory actions taken by Tyson against Terry in response to his affiliation with, and leadership role in, a newly organized regional growers' association. Terry brought suit under the Agricultural Fair Practices Act of 1967 ("AFPA"), 7 U.S.C. § 2303, alleging unlawful interference and discrimination based on his membership in the growers' association; and the Packers and Stockyards Act ("PSA"), 7 U.S.C. §§ 192(a) and (b), alleging that Tyson engaged in unfair,

discriminatory or deceptive practices, and subjected him to undue or unreasonable prejudice or disadvantage.

Tyson moved to dismiss Terry's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion as to both claims and entered judgment in favor of Tyson. In doing so, the court determined that Terry failed to allege his involvement with an "association of producers," as defined and required by the AFPA, 7 U.S.C. § 2302(c) (2008). The district court also awarded Tyson attorney's fees incurred in defending against Terry's AFPA claim, pursuant to 7 U.S.C. § 2305(a). With respect to Terry's PSA claim, the district court held that proof of injury to competition is a necessary element of a claim under 7 U.S.C. §§ 192(a) and (b) and, because Terry failed to plead that Tyson's actions had an adverse effect on competition, this count likewise must be dismissed for failure to state a claim.

Terry now appeals the dismissal of his complaint and the district court's award of attorney's fees to Tyson. For the following reasons, we affirm.

I.

In our de novo review of the district court's grant of Tyson's motion to dismiss under Rule 12(b)(6), we construe Terry's complaint in the light most favorable to him and accept his well-pled factual allegations as true. *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008).

In 2001, Terry bought a poultry farm in Tennessee and entered into an agreement with Tyson, which

contracts with independent growers to raise broiler chickens owned and provided by the company. Tyson provides the chicks, feed, and technical advice; the responsibility of the grower is to raise the chickens to a target processing weight and then return the mature birds to Tyson. Tyson pays its growers according to a formula that measures the relative productivity of the growers by comparing the amount of feed provided and the weight of the chickens upon their return to the processing plant. Consequently, the weight of the chickens at the end of the grow-out period is an important factor in the compensation equation, and federal regulations provide that weighing is to occur immediately upon arrival at the processor's plant. *See* 9 C.F.R. § 201.82(b).[1] A grower is entitled to watch his birds being weighed. *See* 9 C.F.R. § 201.108-1(e)(4).[2] Tyson's alleged failure to promptly weigh Terry's chickens and allow Terry access to the weighing of his birds began the chain of events that culminated in this lawsuit.

Before he purchased the farm, Terry researched the poultry business, reviewed the seller's production records, and spoke with Tyson's production manager at

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[1] 9 C.F.R. § 201.82(b) provides: "Whenever live poultry is obtained under a poultry growing arrangement, the poultry shall be transported promptly after loading and the gross weight for grower payment purposes shall be determined immediately upon arrival at the processing plant, holding yard, or other scale normally used for such purpose."

[2] 9 C.F.R. § 201.108-1(e)(4) states in pertinent part: "Poultry growers . . . are entitled to observe the balancing, weighing, and recording procedures. A weigher shall not deny such persons that right or withhold from them any information pertaining to the weight."

its Shelbyville, Tennessee, complex about Tyson's intent to continue its placement of chickens at the farm following the sale. The production manager assured Terry that the farm and equipment were in excellent condition and that it was a top-producing farm. These assurances lead Terry to believe that the farm would need no substantial improvements in the near future. In the summer of 2001, Terry and his family moved to the farm, and he took over management of the poultry flock.

Terry thereafter became aware of numerous problems that poultry growers were experiencing with Tyson and other poultry processors. In 2002, Terry attended a conference in North Carolina with other contract growers, attorneys representing growers, and representatives of farmers' organizations. The purpose of the conference was to address the problems faced by growers in their dealings with processors and to provide guidelines for the organization of grower associations. After the conference, Terry became actively involved in organizing the poultry growers in his area into what ultimately became the Tennessee Poultry Growers Association ("TPGA"). In 2004, he was elected chairman of the directors for the TPGA. In his capacity as a TPGA officer, Terry educated poultry growers about their rights under federal law and reported complaints about Tyson to officials at the Packers and Stockyards Administration in Washington, D.C.

Meanwhile, Terry became concerned that his poultry was not being weighed promptly upon arrival at the Tyson plant, as required by his contract and federal regulations. In August and December of 2004, he went to Tyson's plant to watch his birds being

weighed, but he was denied access. He complained to a federal official and requested that a letter be sent to Tyson. On February 13, 2005, Terry followed a truck loaded with his poultry to Tyson's processing plant. When he arrived at the plant at 2:00 a.m., he was told that his chickens would not be weighed until after 4:00 a.m. When Terry returned at 4:00 a.m., he was once again denied access to the plant. Plaintiff called an agent with the Grain Inspection Division of the Packers and Stockyards Administration, who told Terry that he was in route to the plant and would find out why Terry was not allowed to observe the weighing of his poultry.

Later that same week, Terry met with Tyson's local managers. Following the meeting, Tyson delayed its placement of birds on Terry's farm for a full flock rotation, costing Terry $30,000 in lost compensation. When Terry met with Tyson's managers again on March 28, 2005, they informed him that Tyson made a "company decision" to discontinue the placement of birds at his farm after he made the weighing complaint. Terry asked for, but was refused, compensation for the damages he sustained as a result of the missed flock.

On January 11, 2006, Tyson notified Terry that his contract would not be renewed, allegedly because of his confrontational behavior toward Tyson's representatives and his failure to make "costly and unnecessary" changes to his poultry operation, despite the fact that Terry was a successful poultry producer and was "well above average" in the grower rankings. Terry avers that "[t]he reasons provided by Tyson for termination of [his] contract were false and pretextual to disguise Tyson's real reason, which was to thwart

[his] efforts to organize growers, and in retaliation for [his] complaints to the Packers [and] Stockyards Administration." Terry subsequently advertised his farm for sale, but claims that he has been unable to sell it due to Tyson's demands for costly upgrades as a condition to the continued placement of poultry at the farm. This lawsuit followed.

II.

"[T]o survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Tam Travel, Inc. v. Delta Airlines, Inc.*, 583 F.3d 896, 903 (6th Cir. 2009) (citation omitted). "We need not accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Id.* (citations and internal quotation marks omitted). "[T]he complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level,' and 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

The parties to this appeal do not dispute the factual specificity of Terry's allegations. Rather, at issue is whether Terry's complaint contains adequate "direct or inferential allegations respecting all material elements to sustain a recovery" under the AFPA and PSA. *Tam Travel, Inc.*, 583 F.3d at 903. With regard to the latter statute, however, we must first settle the question whether a showing of injury to competition is a necessary element of a claim under the PSA.

III.

This case poses a matter of first impression in this circuit: whether a plaintiff asserting unfair discriminatory practices or undue preference under §§ 202(a) and (b) of the PSA must allege an adverse effect on competition in order to state a claim. This issue is not novel to other courts; it has been addressed by seven of our sister circuits, with consonant results. All of these courts of appeals unanimously agree that an anticompetitive effect is necessary for an actionable claim under subsections (a) and (b). For the reasons that follow, we join this legion.

Section 202 of the PSA, codified at 7 U.S.C. § 192, provides:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any otherperson (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

> (g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

7 U.S.C. § 192 (hereinafter "§ 192").

Terry alleges in Count Two of his complaint that "[d]efendant violated the [PSA] by engaging in unfair, unjustly discriminatory, or deceptive practices or devises [sic] in violation of § 202 of the [PSA], 7 U.S.C. § 192(a); and by subjecting Plaintiff to undue or unreasonable prejudice or disadvantage in violation of 7 U.S.C. § 192(b)." However, Tyson argued, and the district court agreed, that because the PSA is essentially an antitrust statute, subsections (a) and (b) require a party to allege an adverse effect on competition in order to sustain a cause of action. The district court dismissed Terry's PSA claim for failure to allege such anticompetitive activity on Tyson's part. In reaching this conclusion, the court noted the dearth of Sixth Circuit precedent on this issue and followed the prevailing tide of other circuit court decisions that have held that subsections (a) and (b) of § 192 require an anticompetitive effect.

The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals' en banc decision in *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." *Wheeler*, 591 F.3d at 357.

All told, seven circuits – the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have now weighed in on this issue, with unanimous results. *See Wheeler*, 591 F.3d 355; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. Oct. 5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *DeJong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).

In this appeal, Terry, joined by amicus curiae United States Department of Agriculture ("USDA"), seeks to persuade us to adopt the decidedly minority view embraced by some district courts and vigorously articulated by Judge Garza, along with six of his colleagues, in his dissenting opinion in *Wheeler*. *See Wheeler*, 591 F.3d at 371 (Garza, J., dissenting). *See also Schumacher v. Tyson Fresh Meats, Inc.*, 434 F. Supp. 2d 748, 754 (D.S.D. 2006) (holding that "§ 192(a)[] does not prohibit only those unfair and deceptive practices which adversely affect competition"); *Kinkaid v. John Morrell & Co.*, 321 F. Supp. 2d 1090, 1102 (N.D. Iowa 2004) ("[T]his court finds that only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive'

within the meaning of § 192(a) must *also* be 'monopolistic' or 'anticompetitive' to be prohibited."); *Gerace v. Utica Veal Co., Inc.*, 580 F. Supp. 1465, 1469-70 (N.D.N.Y. 1984) (holding that it is unnecessary to allege restraint of trade or hindrance of competition under § 192(a)).

Ultimately, Terry and the USDA would have this court deviate from the course taken by the seven other circuits that have spoken on this issue, thus creating a conflict. We decline to do so. "[W]hile we recognize that we are not bound by the law of other Circuits, this court has also routinely looked to the majority position of other Circuits in resolving undecided issues of law. We also take note of the importance of maintaining harmony among the Circuits on issues of law." *Wong v. Partygaming Ltd.*, 589 F.3d 821, 827-28 (6th Cir. 2009) (citations omitted); *see also United States v. Washington*, 584 F.3d 693, 698 (6th Cir. 2009) ("[T]his court routinely looks to our sister circuits for guidance when we encounter a legal question that we have not previously passed upon."). As one court has explained, this is more than a courtesy:

> As a general matter, we do not create conflicts among the circuits without strong cause. We adhere to this view because federal law (unlike state law) is supposed to be unitary. It would, of course, be foolhardy to suggest that we should blindly adhere to another circuit court's decision as a fail-safe method of preventing intercircuit conflict. Congress has created multiple and co-equal intermediate federal appellate courts, each with an equal power and duty to decide the cases properly brought before it. This regime, by design, embraces the possibility of a considered

> difference in views among the circuit courts on a given question; a policy of blind adherence to the decision of another circuit, apart from any utility it might have in promoting uniformity and predictability in outcome, would flout the manifest will of Congress. As then-Judge Ginsburg had occasion to observe in *In re Korean Air Lines Disaster*, "each [federal court] has an obligation to engage independently in reasoned analysis." 829 F.2d 1171, 1176 (D.C. Cir. 1987), *aff'd*, 490 U.S. 122 [] (1989). At the same time, the interest that all prospective parties before the court have in uniformity and predictability of outcome must be given its due. We thus temper the independence of the analysis in which we engage by according great weight to the decisions of other circuits on the same question.

Washington Energy Co. v. United States, 94 F.3d 1557, 1561 (Fed. Cir. 1996).[3] Indeed, the *Wheeler* court was

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[3] *See also Admiral Fin. Corp. v. United States*, 378 F.3d 1336, 1340 (Fed. Cir. 2004) ("[W]e accord great weight to the decisions of our sister circuits when the same or similar issues come before us, and we do not create conflicts among the circuits without strong cause.") (internal quotation marks omitted); *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) ("[A]lthough we are by no means compelled to follow the decisions of other circuits, there is virtue in uniformity of federal law as construed by the federal circuits.") (citation and internal quotation marks omitted); *United States v. Auginash*, 266 F.3d 781, 784 (8th Cir. 2001) ("Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus

sensitive to the vast body of cohesive precedent when it pointed out that "[p]redictability must be the lodestar." *Wheeler*, 591 F.3d at 363.

As the next in line to interpret § 192's requirements, we, too, assign great weight to the unanimity of thought that precedes our own determination of this issue. Needless to say, "[w]e are not merely to count noses." *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995).[4] However, the rationale employed by our sister circuits is well-reasoned and grounded on sound principles of statutory construction. Moreover, under the fundamental principle of stare decisis, we deem the construction of this nearly 90-year-old statute to be a matter of settled law. We therefore join these circuits and hold that in order to succeed on a claim under §§ 192(a) and (b) of the PSA, a plaintiff must show an adverse effect on competition.

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avoiding unnecessary burdens on the Supreme Court docket.") (internal quotations marks omitted); *Mayer v. Spanel Int'l Ltd.*, 51 F.3d 670, 675 (7th Cir. 1995) ("We do not create conflicts among the circuits without strong cause."); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991) ("Where there is the considerable weight of unanimous authority, we believe that creation of such a circuit conflict must be based on an abiding conviction that the view of several other courts is unreasonable, lest the Supreme Court's ability to resolve conflicts among the circuits be impaired by the sheer number of such conflicts.").

[4] "[W]e are not constrained to follow [the views of our sister circuits] if, in our opinion, they are based upon an incomplete or incorrect analysis." *Nixon v. Kent County*, 76 F.3d 1381, 1388 (6th Cir. 1996) (citation omitted).

In the present case, the district court properly determined that although Terry asserts a number of wrongful acts by Tyson, his complaint does not allege that Tyson's actions had an anticompetitive effect: "Plaintiff focuses solely on how Defendant's action harmed him as an individual grower. He makes no allegations regarding the effect of Defendant's actions on the pricing of poultry or on overall competition in the poultry industry." Accordingly, the district court did not err in granting Tyson's motion to dismiss Terry's PSA claim.

IV.

Congress enacted the AFPA in 1968 to "protect[] the right of farmers and other producers of agricultural commodities to join cooperative associations through which to market their products," and "to rectify a perceived imbalance in bargaining position between producers and processors of such products." *Mich. Canners and Freezers Ass'n, Inc. v. Agric. Mktg. and Bargaining Bd.*, 467 U.S. 461, 464 (1984) (footnotes omitted). "[T]he Act's principal purpose is to protect individual producers from interference by processors when deciding whether to belong to a producers' association . . . ." *Id.*; *see also Newark Gardens, Inc. v. Mich. Potato Indus. Comm'n*, 847 F.2d 1201, 1203 (6th Cir. 1988); 7 U.S.C. § 2301 ("Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law."). Consistent with these aims, the AFPA proscribes certain actions by processors, known as "handlers" under the Act:

> It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices:
>
> > (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or
> >
> > (b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers[.]

7 U.S.C. §§ 2303(a) and (b).

In Count One of his complaint, Terry alleges that Tyson violated § 2303 by "knowingly permitting its employee or agent to coerce and intimidate Plaintiff in the exercise of his right to join and belong to an association of producers and by discriminating against Plaintiff with respect to the quantity and quality of poultry and feed supplied to Plaintiff because of his membership in an association of producers."

The parties do not dispute that Tyson is a "handler" and Terry is a "producer," as defined by the AFPA. *See* 7 U.S.C. §§ 2302(3)(A) and(4) (defining these respective terms). Rather, the dispositive issue is whether the association with which Terry was affiliated – the TPGA – satisfies the AFPA's definition

of an "association of producers," so as to bring his allegations of coercion and discrimination under the protective umbrella of the statute. During the time period relevant to this cause of action, the AFPA defined an "association of producers" as "any association of producers of agricultural products *engaged in marketing, bargaining, shipping, or processing as defined in section 1141j(a) of Title 12, or in section 291 of this title*." 7 U.S.C. § 2302(c) (emphasis added).[5]

Section 2302(c) of the AFPA cross-references two other statutes, the Agricultural Marketing Act of 1929 ("AMA") and the Capper-Volstead Act, which define similar farming associations. The AMA was enacted to promote the efficient production and distribution of agricultural commodities, in part, by permitting producers to organize "cooperative associations" to assist in bringing products to market. 12 U.S.C.

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[5] The recently enacted Food, Conservation, and Energy Act of 2008 expanded the definition of "association of producers" to include "an organization whose membership is exclusively limited to agricultural producers and dedicated to promoting the common interest and general welfare of producers of agricultural products." 7 U.S.C. § 2302(2)(B). *See* Pub. L. 110-234, § 11003(6)(B), and Pub. L. 110-246, § 11003(6)(B) (redesignating former subsection (c) of § 2302 as paragraph 2 and added subparagraphs (A) and (B)). The issue of retroactive application of this amendment, effective May 22, 2008, has not been raised by Terry on appeal and hence is forfeited. *See generally United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) ("[A]n appellant abandons all issues not raised and argued in its initial brief on appeal.") (citation and quotation marks omitted); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 544 n.8 (6th Cir. 2002) ("It is well established that an issue not raised in a party's briefs on appeal may be deemed waived.").

§ 1141(a)(3); *see Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1042 (2d Cir. 1980) (observing that the declared policy of the AMA is "to promote the effective merchandising of agricultural commodities" through "a farm marketing system of producer-owned and producer-controlled cooperative associations."). The AMA defines the term "cooperative association" as

> any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services . . . .

12 U.S.C. § 1141j(a).

The Capper-Volstead Act "removed from the proscription of the antitrust laws cooperatives formed by certain agricultural producers that otherwise would be directly competing with each other in efforts to bring their goods to market." *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 822 (1978) (footnote omitted). It was passed by Congress in 1922 "to make it clear that the formation of an agricultural organization with capital would not result in a violation of the antitrust laws, and that the organization, without antitrust consequences, could perform certain functions in preparing produce for market." *Id.* at 824; *see also Newark Gardens, Inc.*, 847 F.2d at 1208 (noting that the Capper-Volstead Act "exempts agricultural cooperatives from the antitrust laws"). The Capper-Volstead Act includes within its scope agricultural producers who "act together in

associations . . . in collectively processing, preparing for market, handling, and marketing [farm products] in interstate and foreign commerce." 7 U.S.C. § 291. "The real sense behind such an association and the prime purpose of the persons so banding together is to accomplish a common objective – collective marketing. It is a collection of producers cooperating to sell the goods they have produced." *United States v. Elm Springs Farm, Inc.*, 38 F. Supp. 508, 511 (D. Mass. 1941); *see also Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1185 (8th Cir. 1982) ("The unmistakable purpose of the Capper-Volstead Act is to permit farmers and only farmers to band together and benefit economically from collective marketing of their products.").

In its motion to dismiss, Tyson argued that the TPGA does not qualify as an AFPA "association of producers" because Terry does not allege that the TPGA engaged in the requisite "marketing, bargaining, shipping, or processing" activities enumerated in § 2302(c); instead, Terry's complaint avers only that the TPGA gathered information, educated its members, and reported complaints about Tyson and other processors to the government – functions purportedly outside of the purview of the AFPA.

The district court examined Terry's complaint and, relying on the plain language of § 2302(c), agreed with Tyson that the TPGA does not fall within the statutory definition of an "association of producers":

> Interpreting § 2302(c), the United States Court of Appeals for the Sixth Circuit has held that a state-run potato commission was not an

"association of producers" because it did not engage in marketing, bargaining, shipping or processing of agricultural products. *Newark Gardens, Inc. v. Mich. Potato Indus. Comm'n*, 847 F.2d 1201, 1206 (6th Cir. 1988).

In his capacity as president of the TPGA, Plaintiff "gathered information from other growers about problems they were having with Tyson" and reported these complaints to government agencies. (Complaint, Court Doc. 1, ¶ 13.). Plaintiff also "educated other growers about federal laws prohibiting abuse of growers in the poultry industry." (*Id.* at ¶ 14.). Plaintiff distributed video tapes to other growers that reported on problems in the poultry industry. (*Id.* at ¶ 15.). From the allegations in Plaintiff's complaint, it appears that TPGA is principally involved with educating growers about their rights and assisting growers with enforcing their rights by reporting producers' violations to federal agencies.

Defendant argues that TPGA's "educational and informational efforts and, to the extent that they exist, its government complaints, do not qualify it as an 'association of producers'" under the AFPA. (Court Doc. 11 at 7.). The statutory language is clear that an "association of producers" includes only those organizations that engage in "marketing, bargaining, shipping or processing" of agricultural products. 7 U.S.C. § 2302(c). The Court must therefore evaluate whether the TPGA is involved with any of the specified activities.

"Marketing" is "the act of buying and selling in a market; the commercial functions involved in transferring goods from producer to consumer." *The American Heritage Dictionary of the English Language* 1072 (4th ed. 2000). No reasonable inference can be drawn from the allegations in the complaint that the TPGA engages in buying or selling of goods in a market or in the commercial functions involved with transferring goods from producer to consumer. The actions of the TPGA do not, therefore, qualify as marketing under § 2302.

"Shipping" is "the act or business of transporting goods." *Id.* at 1607. "Producing" is "to bring forth, yield; to manufacture; to cause to occur or exist; to make or yield products or a product." *Id.* at 1399. No reasonable inference can be drawn from the complaint that the TPGA is involved with shipping or producing agricultural goods under § 2302.

"Bargaining" is "to negotiate the terms of an agreement, as to sell or exchange; to engage in collective bargaining; to arrive at an agreement." *Id.* at 144. There is no allegation that TPGA negotiates on behalf of any of its members or, as discussed above, sells or exchanges agricultural goods. "Collective bargaining" is "negotiation between organized workers and their employer or employers to determine wages, hours, rules, and working conditions." *Id.* at 362. Although it appears that Plaintiff, in his role as president of TPGA, discussed issues such as working conditions and federal laws with other growers, there is no

> allegation that he ever discussed those issues with Defendant. Moreover, the relationship between Plaintiff and Defendant is not that of employer/employee but of two commercial organizations under contractual obligations to each other. There is no indication from the allegations in the complaint that TPGA had any interaction with Defendant and could not, therefore, have collectively bargained with Defendant. As such, there is no indication that TPGA engaged in "bargaining," collective or otherwise, with regard to agricultural products as required by § 2302.

The district court further determined that the TPGA's educational and enforcement activities did not otherwise fall within the cross-referenced definitions set forth in the AMA and Capper-Volstead Act, and observed that "[t]here is no apparent policy reason that the activities of the TPGA would be subject to antitrust laws and therefore no need to establish an exemption for such activities." Therefore, because a material element of Terry's AFPA claim was fatally lacking, the district court dismissed Terry's AFPA claim. We affirm the district court's sound decision.

Terry argues that in granting Tyson's motion to dismiss, the district court employed a pleading standard that is too exacting under *Twombly*. He contends that "[a] plausible reading of [his] [c]omplaint is that one of the purposes of [the TPGA] was to strengthen the marketing and bargaining position of the growers who were organizing to address common grievances and concerns in their relationship with Tyson" and, therefore, the TPGA qualifies as an "association of producers." According to Terry, the

district court's "narrow" construction of the AFPA is at odds with the remedial purpose of the statute, i.e., to prevent processors from using their superior bargaining position to the detriment of producers. Terry maintains that Tyson has effectively chilled the ability of its contract growers to form an association for their mutual benefit and increase their bargaining power, thereby defying the protective goals of the AFPA.

However, Terry's interpretation of the AFPA disregards the plain language of the statute, *see Thompson v. N. Am. Stainless*, 567 F.3d 804, 807 (6th Cir. 2009) (en banc), and the germane maxim *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of others"), *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001), that "justifies] the inference that [activities] not mentioned were excluded by deliberate choice, not inadvertence . . . ." *City of Cleveland v. Ohio*, 508 F.3d 827, 847 (6th Cir. 2007) (citation and internal quotation marks omitted). Terry's complaint does not allege that the TPGA engaged in any of the primary functions of an "association of producers" enumerated in the AFPA or related statutes. Moreover, Terry's stance is contradictory to our prior decision in *Newark Gardens*.

In *Newark Gardens*, the plaintiff, a Michigan potato-farming business, brought suit against the Michigan Potato Industry Commission, alleging that certain provisions of a Michigan statute that required potato producers to pay a promotional assessment to the commission was in conflict with and, thus, preempted by the AFPA. *Newark Gardens*, 847 F.2d at 1201. The plaintiff argued that it was being coerced into joining or belonging to an "association of

producers" in violation of § 2303(a) of the AFPA, or maintaining a "*marketing* contract with an association of producers" in violation of § 2303(c). *Id.* at 1207. The express purpose of the Potato Commission was to "foster, develop, and promote the potato industry through research, promotion, advertising, market expansion, development of new markets, education, and the development and dissemination of market and industry information." *Id.* at 1202 (quoting MICH. COMP. LAWS § 290.423(1)). We rejected the plaintiff's "expansive interpretation of the definition of 'association of producers,'" namely, its argument that because the Potato Commission supplied "market information," it therefore engaged in "marketing" under the AFPA:

> The district court concluded that [the] definitional sections [of the AFPA, AMA and Capper-Volstead Act] described traditional cooperatives among farmers and did not contemplate governmental commodity promotion boards such as the Potato Commission . . . . The district court found that the Potato Commission was not within "the cooperative association tradition" because it did not engage in collective bargaining on behalf of farmers, nor did it perform any act which involved the sale or transfer of title in potatoes from grower to shipper to retailer to consumer. Therefore, since the Commission did not fit within the definitions contained in 7 U.S.C. § 291 or 12 U.S.C. § 1141j(a), the court reasoned

> that it was not an "association of producers" within the meaning of the AFPA as defined in 7 U.S.C. § 2302(c). We agree.

Id. at 1208.

We therefore affirmed the district court's grant of summary judgment to the defendant. *Id.* at 1210. In so holding, we distinguished *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir. 1974), in which the Ninth Circuit Court of Appeals held that two potato-growers' associations engaged in "marketing" within the meaning of the Capper-Volstead Act and therefore were immune from antitrust prosecution. The Ninth Circuit broadly construed the term "marketing" and concluded that even though the associations "did not collectively process, prepare for market, handle or actually sell potatoes,"[6] their activities nonetheless constituted marketing because each association "negotiat[ed] contracts for the sale of potatoes by its members," which "necessarily require[d] supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes." *Treasure Valley*, 497 F.2d at 215.

In *Newark Gardens*, we concluded that "[t]he collective bargaining activities of the associations which represented the farmers in *Treasure Valley* are clearly distinguishable from the activities of the Potato Commission . . . . These bargaining associations which negotiated with the processors on behalf of the farmers

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[6] These activities were carried out by the individual members.

were within the traditional definition of cooperative associations." *Newark Gardens*, 847 F.2d at 1209. By contrast, the Potato Commission "does not attempt to dictate the price, terms, or timing of the sale of potatoes in Michigan." *Id.* at 1206. "Potato producers are free to sell to whomever they choose at whatever price they negotiate." *Id.*[7]

As our decision in *Newark Gardens* makes clear, the term "association of producers" includes only those organizations that are directly involved with bringing farmers' products to market. The TPGA, according to Terry's well-pled allegations, simply does not fit this profile. Like the Potato Commission in *Newark Gardens*, the TPGA neither negotiates with poultry

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[7] This distinction drawn in *Newark Gardens* is equally applicable to other cases which have found that an association has engaged in "marketing" under the Capper-Volstead Act. *See, e.g., Fairdale Farms, Inc.*, 635 F.2d at 1040 (eschewing a "hyper-technical reading" of the Capper-Volstead Act in determining that cooperative associations organized for the sole purpose of fixing prices were engaged in marketing and therefore entitled to antitrust protection under the act); *Agritronics Corp. v. Nat'l Dairy Herd Ass'n, Inc.*, 914 F. Supp. 814, 825 (N.D.N.Y. 1996) ("In the case at bar, the Complaint by its own terms states that defendants are in the business of 'testing milk and providing the "official" milk production records for dairy farmers.' As such, each defendant [association] clearly has demonstrated that it is performing a 'marketing' function within the meaning of the . . . Capper-Volstead Act[]."); *N. Cal. Supermarkets, Inc. v. Cent. Cal. Lettuce Producers Coop.*, 413 F. Supp. 984, 991-92 (N.D. Cal. 1976) (citing *Treasure Valley* and holding that activities of lettuce producers' cooperative association fell within protective scope of Capper-Volstead Act because, even though the cooperative did not grow, ship, sell, or negotiate the sale of products in its own name, it set prices, supplied market information, and performed other acts related to the transfer of title of the products).

processors nor "perform[s] any act which involve[s] the sale or transfer of title in [poultry] from grower to shipper to retailer to consumer." *Id.* at 1208. Nothing in Terry's complaint suggests that the TPGA is primarily engaged in one or more of the AFPA's designated activities, i.e., "marketing, bargaining, shipping or processing" its members' agricultural products. 7 U.S.C. § 2302(c). *Cf. I.C.C. v. Jamestown Farmers Union Federated Coop. Transp. Ass'n*, 57 F. Supp. 749, 753 (D. Minn. 1944), *aff'd* 151 F.2d 403 (8th Cir. 1945) ("[I]f the cooperative is predominantly engaged in one or more of the activities specified in the [AMA], . . . such association does not lose its fundamental character as a cooperative" by engaging in other activities incidental to the primary statutory activity.). Rather, it is an organization principally involved with educating growers about their rights and assisting growers in the enforcement of those rights by reporting processors' violations to federal authorities. The fact that the TPGA's educational and policing activities may have the incidental benefit of increasing the growers' bargaining power, as Terry posits, does not bring it within the AFPA's definition of "association of producers," because, as *Newark Gardens* demonstrates, such an association must *itself* bargain or market on behalf of its members.

Terry has failed to allege that Tyson's unlawful actions stem from his involvement with an AFPA-protected "association of producers." Consequently, his complaint is deficient, in that it does not "contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Tam Travel, Inc.*, 583 F.3d at 903 (citation omitted). We therefore affirm the district court's dismissal of his AFPA claim pursuant to Rule

12(b)(6). *Cf. Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 637 (10th Cir. 1998), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) ("The prohibition on the making of 'false reports' [under § 2303(e) of the AFPA] . . . appl[ies] only to false reports about associations of producers or handlers which are intended to influence or that have the effect of influencing a producer's decision to join an association. Because plaintiffs' complaint made no allegation concerning membership in such an association, we affirm the district court's dismissal of plaintiffs' AFPA claim for failure to state a claim.").

V.

Next, Terry appeals the district court's award of attorney's fees to Tyson for its legal costs incurred in defending against Terry's AFPA claim. The AFPA's fee-shifting provision states that "[i]n any action commenced pursuant hereto, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." 7 U.S.C. § 2305(a). Terry maintains that we should apply the standard set forth in *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), in which the Supreme Court, in the context of a Title VII civil rights case, held that a prevailing defendant should be awarded attorney's fees only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation," so as not to discourage civil rights plaintiffs or "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Christiansburg Garment Co.*, 434 U.S. at 421-22. *See also Garner v. Cuyahoga County Juvenile Court*, 554 F.3d 624, 635-36 (6th Cir. 2009) (applying

Christiansburg standard to a claim under 42 U.S.C. § 1988). Terry asserts that "[a]n award of fees to a prevailing defendant under a lesser standard than that established by *Christiansburg* would deter producers such as Terry from acting to enforce their rights under the AFPA, thus defeating the very purpose of the Act – to prevent processors from chilling producers from joining together with other growers."

However, Terry failed to raise this issue in a timely manner for the district court's consideration; hence, it is not properly preserved for our review. *See Foster v. Barilow*, 6 F.3d 405, 407-08 (6th Cir. 1993) (holding that issue regarding whether attorney's fees could be awarded to prevailing defendants in an action under the Fair Housing Act, without a determination that the claim was frivolous, groundless, or unreasonable, was forfeited on appeal because it was not raised in the district court); *see also Smoot v. United Transp. Union*, 246 F.3d 633, 648 (6th Cir. 2001) (declining to consider the plaintiff's appellate challenge to award of attorney's fees where the plaintiff failed to raise an objection in the district court); *Moore v. Int'l Bhd. of Elec. Workers, Local 58*, 60 F. App'x 581, 582 (6th Cir. 2003) (unpublished) (affirming district court's judgment in favor of defendants where the plaintiff "failed to timely respond to the defendants' motion for attorneys' fees in the district court, [and thus] waived any objection he had to the defendants' application for and the district court's award of attorneys' fees").

Moreover, there is no reason to deviate from the general forfeiture rule in this case. When faced with an identical unpreserved challenge to an award of attorney's fees to the prevailing defendants in *Foster*, we declined to apply the "narrow" exceptions to the

forfeiture rule because "the issue was not developed with sufficient clarity and completeness in the district court" and "a ruling in favor of the [plaintiffs] would require further litigation in the district court on the frivolousness issue," thereby prolonging the litigation. *Foster*, 6 F.3d at 407-08 (internal quotation marks omitted).

We decline to address Terry's argument under these similar circumstances, where a remand to the district court for further development of the record on the question of bad faith would be necessary.

Terry offers no other reasons why the district court abused its discretion in awarding attorney's fees to Tyson, as the prevailing party, under § 2305(a). In fact, our review of the record indicates that both the magistrate judge, to whom the matter was referred, and the district court thoroughly evaluated Tyson's counsel's billing records, required itemization of AFPA-related fees and a local attorney's affidavit attesting to the reasonableness of the charged hourly rate,[8] and then evaluated the requested fees using the accepted "lodestar" calculation method. *See generally B & G Mining, Inc. v. Dir., Office of Workers' Comp. Programs*, 522 F.3d 657, 661-63 (6th Cir. 2008); *Moore v. Freeman*, 355 F.3d 558, 565-66 (6th Cir. 2004); *Paschal v. Flagstar Bank, FSB*, 297 F.3d 431, 434-35 (6th Cir. 2002); and *Reed v. Rhodes*, 179 F.3d 453, 471-

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[8] Tyson's proffered attorney's fees incurred in defending against both the AFPA and PSA claims totaled $57,455.00. Tyson asserted that $27,461.00, or 47.8% of the total, was for fees incurred in defending the AFPA claim. The district court adopted the magistrate judge's report and recommendation advising that Tyson should be awarded its requested amount of AFPA fees.

73 (6th Cir. 1999). We therefore will not disturb the award.

VI.

For the reasons stated, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-5577

[Filed May 10, 2010]

ALTON T. TERRY, Plaintiff - Appellant,	)
v.	)
TYSON FARMS, INC., Defendant - Appellee.	)

Before: NORRIS, COOK, and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Tennessee at Winchester.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

Case No. 4:08-cv-3
Judge Mattice

[Filed April 9, 2008]

ALTON T. TERRY,	)
	)
Plaintiff,	)
	)
v.	)
	)
TYSON FARMS, INC.,	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

This is an action in which Plaintiff seeks damages against Defendant for alleged violations of the Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 *et seq*., and the Packers and Stockyards Act, 7 U.S.C. § 181 *et seq*. Before the Court is Defendant Tyson Farms, Inc.'s Motion to Dismiss [Court Doc. 10] for failure to state a claim up on which relief can be granted. For the reasons stated below, Defendant's Motion to Dismiss is **GRANTED.**

I. STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint that fails to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is to permit a defendant to test whether, as a matter of law, the plaintiff is entitled to relief even if everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). To survive a motion to dismiss under 12(b)(6), plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Assoc. of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007) (citing *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1974 (2007)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Court must determine not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In making this determination, the Court must construe the complaint in the light most favorable to plaintiff and accept as true all well-pleaded factual allegations. *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999). The Court need not accept as true mere legal conclusions or unwarranted factual inferences. *Id.*

II. FACTS

Taking all well-pled facts as true and construing the complaint in the light most favorable to the Plaintiff, the facts are as follows.

Plaintiff Alton T. Terry became interested in purchasing a poultry farm in 2000. ((Complaint, Court Doc. 1, ¶ 5.) As part of his research prior to purchasing a farm, Plaintiff contacted Mike Brown, an agent of Defendant Tyson Farms, Inc. ("Tyson"), about one of their current producers. (*Id.* ¶ 6.) Brown informed Plaintiff that the farm he wished to purchase was in good condition and was a top producing farm for Defendant. (*Id.* ¶ 7.) Plaintiff was led to believe that the farm would need no substantial improvements in the near future. (*Id.*)

In 2001, Plaintiff and his family purchased the farm and took over management of the farm's flock of poultry. (*Id.* ¶ 8.) Plaintiff became aware of many problems that poultry growers were having with the Defendant and other poultry integrators, and conducted extensive research into the relationship between poultry integrators and contract growers. *(Id.* ¶ 9.)

In 2002, Plaintiff attended a conference in North Carolina with other contract growers, attorneys representing contract growers, and representatives of farmer organizations, designed to address the problems that growers were having in dealing with the integrators. (*Id.* ¶ 10.) Part of the conference was to provide guidelines on organizing grower associations. (*Id.*) After the conference, Plaintiff became actively

involved with trying to organize growers in his area. (*Id.* ¶ 11.)

In 2004, Plaintiff was elected chairman of the directors for the Tennessee Poultry Growers Association. (*Id.* ¶ 12.) In this position, Plaintiff gathered information from other growers about problems they were having with Defendant and educated other growers about their rights under federal law. (*Id.* ¶¶ 13-14.) Plaintiff repeatedly reported growers' complaints to Brett Offutt at the Office of Policy and Litigation of the Packers and Stockyards Administration in Washington, D.C. (*Id.* ¶ 13.)

During his growing contract with Defendant, Plaintiff became concerned that his poultry was not being weighed upon arrival at the plant, as was required by his contract and by federal law. (*Id.* ¶ 16.) In August and December of 2004, Plaintiff went to the plant to watch his birds being weighed and was denied access. (*Id.* ¶ 17.) He complained about his denial of access to Offutt and asked that a letter be sent to Defendant. (*Id.*)

On February 13, 2005, Plaintiff followed the truck loaded with his poultry to Defendant's plant. (*Id.* ¶ 17.) The truck arrived at the plant at 2:00 a.m. but Plaintiff was told that the birds would not be weighed until after 4:00 a.m. (*Id.*) Plaintiff returned to the plant at 4:00 a.m. and was denied access. (*Id.*) Plaintiff then called Steve Warrilow, an agent with the Grain Inspection Packers and Stockyards Administration, who informed Plaintiff that he was on his way to Defendant's plant and would find out why Plaintiff

was denied access to the weighing of his birds. (*Id.* ¶ 18.)

Later that week, Plaintiff met with Defendant's plant managers. (*Id.* ¶ 18.) Following that meeting, Defendant delayed placement of birds on Plaintiff's farm for a full flock rotation, at a cost to Plaintiff of $30,000.00. (*Id.*) Plaintiff met with Defendant's managers again on March 28, 2005 and was told that Defendant had made a "company decision" not to place birds with Plaintiff after he made the weighing complaint. (*Id.*) Plaintiff asked for compensation for the missed flock but was told that Defendant had decided not to pay Plaintiff. (*Id.* ¶ 19.)

On January 11, 2006, Plaintiff was informed by mail that his contract with Defendant would not be renewed because Plaintiff had failed to make "costly and unnecessary" changes to his poultry operations and because of Plaintiff's confrontational behavior towards Tyson's representatives. (*Id.* ¶¶ 20-21.) At that time, Plaintiff was well above average in the grower rankings and was a successful producer of broiler poultry. (*Id.*) Since Defendant terminated its contract with Plaintiff, Plaintiff has advertised his farm for sale but has been unable to sell due to Defendant's demands for costly upgrades before it would agree to place birds on the farm. (*Id.* ¶ 23.)

On January 7, 2008, Plaintiff filed the instant lawsuit, alleging that Defendant violated the Agricultural Fair Practices Act, 7 U.S.C. § 2301 *et seq.*, by discriminating against Plaintiff based on his membership in an association of producers. (*Id.* ¶¶ 24-27.) Plaintiff also alleges that Defendant violated the Packers and Stockyards Act, 7 U.S.C.

§ 181 *et seq.*, by engaging in unfair, unjustly discriminatory or deceptive practices. (*Id.* ¶¶ 28-30.)

III. ANALYSIS

"[T]o survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Eidson v. State of Tennessee Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007). "Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Id.*

A. Agricultural Fair Practices Act of 1967

Defendants move to dismiss Plaintiff's claim under the Agricultural Fair Practices Act ("AFPA") arguing that: (1) Plaintiff's complaint makes no factual allegation that Plaintiff was ever involved with an association of producers; (2) the complaint makes no allegation that Defendant knew that Plaintiff was involved with an association of producers; and (3) any claim prior to January 2006 is barred by the AFPA's two-year statute of limitations. (Court Doc. 11 at 4.)

The AFPA was enacted "to rectify a perceived imbalance in bargaining position between producers and processors" of agricultural products. *Michigan Canners and Freezers Assoc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 465 (1984). The Act's principal purpose is to "protect individual producers from interference by processors when deciding whether to belong to a producers' association." *Id.*

To achieve these goals, the AFPA states that "handlers" are prohibited from "coerc[ing] any producer in the exercise of his right to join and belong to or refrain from joining an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association." 7 U.S.C. § 2303(a). Handlers are also prohibited from "discriminat[ing] against any producer with respect to price, quantity, quality or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers." 7 U.S.C. § 2303(b). The parties agree that Plaintiff is a producer and Defendant is a handler within the meaning of the statute.

The parties dispute whether the Tennessee Poultry Growers Association ("TGPA") of which Plaintiff was a member and one-time president, is an "association of producers" within the meaning of the AFPA. An "association of producers" is defined as "any association of producers of agricultural products engaged in marketing, bargaining, shipping or processing as defined in section 1141(j) of Title 12, or in section 291 of this title." 7 U.S.C. § 230[illegible](c).

To resolve the parties' dispute over the meaning of "association of producers", the Court must begin "where all such inquiries must begin: with the language of the statute itself." *U.S. v. Ron Pair Enterprises, Inc.*, 489 US. 235, 241 (1989). Where a statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute

what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Under the principle of *expressio unius est exclusio alterius*, "the mention of one thing implies the exclusion of another", "[w]hen a statute limits a thing to be done to a particular mode, it includes the negative of any other mode." *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001). Interpreting § 2302(c), the United States Court of Appeals for the Sixth Circuit has held that a state-run potato commission was not an "association of producers" because it did not engage in marketing, bargaining, shipping or processing of agricultural products. *Newark Gardens, Inc. v. Michigan Potato Industry Comm'n*, 847 F.2d 1201, 1206 (6th Cir. 1988).

In his capacity as president of the TPGA, Plaintiff "gathered information from other growers about problems they were having with Tyson" and reported these complaints to government agencies. (Complaint, Court Doc. 1, ¶ 13.) Plaintiff also "educated other growers about federal laws prohibiting abuse of growers in the poultry industry." (*Id.* ¶ 14.) Plaintiff distributed video tapes to other growers that reported problems in the poultry industry. (*Id.* ¶ 15.) From allegations in Plaintiff's complaint, it appears that TPGA is principally involved with educating growers about their rights and assisting growers with enforcing their rights by reporting producers' violations to federal agencies.

Defendant argues that TPGA's "educational and informational efforts and, to the extent that they exist, its government complaints, do not qualify it as an 'association of producers'" under the AFPA. (Court Doc. 11 at 7.) The statutory language is clear that an "association of producers" includes only those

organizations that engage in "marketing, bargaining, shipping or processing"of agricultural products. 7 U.S.C. § 2302(c). The Court must therefore evaluate whether the TPGA is involved with any of the specified activities.

"Marketing" is "the act of buying and selling in a market; the commercial functions involved in transferring goods from producer to consumer." *The American Heritage Dictionary of the English Language* 1072 (4th ed. 2000). No reasonable inference can be drawn from the allegations in the complaint that the TPGA engages in buying or selling of goods in a market or in the commercial functions involved with transferring goods from producer to consumer. The actions of the TPGA do not, therefore, qualify as marketing under § 2302.

"Shipping" is "the act or business of transporting goods." *Id.* at 1607. "Producing" is "to bring forth, yield; to manufacture; to cause to occur or exist; to make or yield products or a product." *Id.* at 1399. No reasonable inference can be drawn from the complaint that the TPGA is involved with shipping or producing agricultural goods under § 2302.

"Bargaining" is "to negotiate the terms of an agreement, as to sell or exchange; to engage in collective bargaining; to arrive at an agreement." *Id.* at 144. There is no allegation that TPGA negotiates on behalf of any of its members or, as discussed above, sells or exchanges agricultural goods. "Collective bargaining" is "negotiation between organized workers and their employer or employers to determine wages, hours, rules, and working conditions." *Id.* at 362. Although it appears that Plaintiff, in his role as

president of TPGA, discussed issues such as working conditions and federal laws with other growers, there is no allegation that he ever discussed those issues with Defendant. Moreover, the relationship between Plaintiff and Defendant is not that of employer/employee but of two commercial organizations under contractual obligations to each other. There is no indication from the allegations in the complaint that TPGA had any interaction with Defendant and could not, therefore, have collectively bargained with Defendant. As such, there is no indication that TPGA engaged in "bargaining," collective or otherwise, with regard to agricultural products as required by § 2302.

The definition of "association of producers" § 2302(c) also cross-references section 12 U.S.C. § 1141(j), a subsection of the Agricultural Marketing Act of 1929, and 7 U.S.C. § 291, a subsection of the Capper-Volstead Act. Both of these statutes exempt agricultural cooperatives from federal antitrust regulation.

The Agricultural Marketing Act ("AMA") "authorizes marketing agreement and marketing orders in order to maintain orderly marketing conditions in interstate commerce for agricultural commodities. Marketing agreements are formal, voluntary agreements between the Secretary of Agriculture and handlers of a particular commodity who have signed the agreement." *Newark Gardens*, 847 F.2d at 1209-10. Section 1141(j) of the AMA provides in relevant part:

> As used in this subchapter, the term "cooperative association" means any association in which farmers act together in processing,

> preparing for market, handling, and/or marketing the farm products of persons so engaged , and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm services.

12 U.S.C. § 1141(j). The TPGA's educational and enforcement actions do not bring it within the meaning of "cooperative association" under the AMA.

The purpose of the Capper-Volstead Act was to exempt agricultural cooperatives from the antitrust laws. *Newark Gardens*, 847 F.2d at 1208. Section 291 of the Capper-Volstead Act states:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have their marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes.

7 U.S.C. § 291. None of the actions of the TPGA involve "processing, preparing for market, handling, [or] marketing in interstate and foreign commerce."

Based on the evidence before the Court, the TPGA does not appear to be the type of organization

envisioned by the Capper-Volstead Act. There is no apparent policy reason that the activities of the TPGA would be subject to antitrust laws and therefore no need to establish an exemption for such activities.

Under the plain language of § 2302(c), in order to qualify as an "association of producers", an organization must be engaged in "marketing, bargaining, shipping or producing" of agricultural goods or must fall within cited provisions of the AMA or the Capper-Volstead Act. The doctrine of *expressio unius est exclusio alterius* precludes the Court from looking beyond the specified activities in determining whether an organization qualifies as an "association of producers". An organization that educates growers about their rights and assists them with enforcing those rights does not qualify as an "association of producers" within the meaning of the AFPA.

Plaintiff argues that he does not need to establish that he was involved with an association of producers in order to state a claim under the AFPA and relies on a federal district court decision out of Georgia to support his claim. (Court Doc. 12 at 8.) Plaintiff's argument ignores, however, *Newark Gardens, Inc. v. Michigan Potato Industry Commission*, 847 F.2d 1201 (6th Cir. 1988), in which the Sixth Circuit held that, because defendant potato cooperative was not an "association of producers", the AFPA did not apply and, therefore, did not preempt state law. The *Newark Gardens* holding implies that in order to sustain a cause of action under the AFPA, at least one party must be affiliated with an "association of producers." *Id.* at 1208. See also *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 637 (10th Cir. 1998), *abrogated on other grounds by Exxon Mobil Corp. v. Allapaffah Servs.*,

Inc., 545 U.S. 546, 552 (2005) ("Since plaintiffs' complaint made no allegation concerning membership in [an association of producers], we affirm the district court's dismissal of plaintiffs' AFPA claim for failure to state a claim.") A published opinion of the United States Court of Appeals for the Sixth Circuit is binding on this Court. Taking all well-pled allegations as true and construing the complaint in the light most favorable to the Plaintiff, the Court finds that Plaintiff has failed to establish that he was involved with an "association of producers" within the meaning of § 2302(c).

Accordingly, Defendant's Motion to Dismiss [Court Doc. 10] is **GRANTED** as to Plaintiff's claim under the AFPA. Plaintiff's claim under the AFPA is **DISMISSED WITH PREJUDICE**.

B. Attorney's Fees Incurred in Defending Against Plaintiff's Claims under the AFPA.

Defendants have asked the Court to award it the attorney's fees incurred in defending against Plaintiff's AFPA claim. (Court Doc. 11 at 11-12.) The AFPA allows a court to award attorney's fees to the prevailing party in an action brought pursuant to its terms. 7 U.S.C. § 2305(c).

Where a plaintiff's claims are dismissed on defendant's motion, defendant is the prevailing party. *Jefferson v. Jefferson County Public School System*, 360 F.3d 583, 591 (6th Cir. 2004). As discussed above, the Court has dismissed Plaintiff's claim under the AFPA for failure to state a claim upon which relief could be granted. Accordingly, Defendant is the

prevailing party with respect to this claim and, pursuant to 7 U.S.C. § 2305(c), is entitled to its attorney's fees incurred in defending against Plaintiff's AFPA claim.

C. Packers and Stockyards Act ("PSA")

Plaintiff claims that Defendant "engag[ed] in unfair, unjustly discriminatory, or deceptive practices or devises in violation of § 202 of the Packers & Stockyards Act, 7 U.S.C. § 192(a); and by subjecting Plaintiff to undue or unreasonable prejudice or disadvantage in violation of 7 U.S.C. § 192(b)." (Court Doc. 1 ¶ 29.) Defendant argues for dismissal of these claims, stating that the PSA is an antitrust statute and Plaintiff has failed to allege any anticompetitive activity by Defendant. (Court Doc. 11 at 13-14.) Defendant also contends that Plaintiff has failed to claim any anticompetitive injuries. (*Id.* at 17.)

Section 202(a) of the PSA makes it unlawful for a live poultry dealer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device." 7 U.S.C. § 192(a). Section 202(b) makes it unlawful for a live poultry dealer to "[m]ake or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 7 U.S.C. § 192(b).

"As in all cases of statutory construction, [the court's] task is to interpret the words of the statute in light of the purposes Congress sought to serve." *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983). "The

primary purpose of the PSA was to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry." *London v. Fielddale Farms Corp.*, 410 F.3d 1295, 1302 (11th Cir. 2005) (citing PSA's legislative history). At the time the PSA was enacted, Congress was concerned with the potential for a monopoly of packers, and the Act "was aimed at halting a general course of action for the purpose of destroying competition." *Armour & Co. v. United States*, 402 F.2d 712, 720 (7th Cir. 1968) (internal citation and quotation omitted). The statute does not define what constitutes "unfair, unjustly discriminatory, or deceptive practice[s] or device[s]," nor has the Sixth Circuit addressed the meaning of these terms within the context of § 202. The Court must therefore interpret § 202(a) and § 202(b) in light of Congress's purpose in enacting the PSA. *Norfolk Redevelopment*, 464 U.S. at 36. Given the PSA's antitrust roots, several circuit courts have held that an unfair, discriminatory or deceptive act must have an anticompetitive effect in order to sustain a cause of action under § 202. *See Armour*, 402 F.2d at 717 (section 202(a) claim fails "absent some predatory intent or some likelihood of competitive injury"); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007) ("We therefore join those circuits requiring a plaintiff who challenges a practice under § 202(a) to show that the practice injures or is likely to injure competition."); *London*, 410 F.3d at 1302 ("We join those circuits that hold that in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition."); *Philson v. Goldsboro*, 1998 WL 709324, *4 (4th Cir. Oct. 5, 1998) (plaintiffs "were required to prove that the defendants' conduct was likely to affect

competition adversely in order to prevail on their claims under [the PSA]."

Plaintiff claims there is a split in the circuits as to this issue because the Ninth Circuit has held that no showing of anticompetitive effect is necessary under the PSA. In support of this contention, Plaintiff cites *Spencer Livestock Comm'n Co. v. Dep't of Agriculture*, 841 F.2d 1451,1455 (9th Cir. 1988). (Court Doc. 12 at 18-19.) The court in *Spencer*, however, was not interpreting § 202, but instead § 312(a) of the PSA, which regulates the activities of stockyard owners, market agencies and dealers. *Spencer*, 841 F.2d at 1453. In a case involving § 202, the Ninth Circuit held that "unfair practices under § 202 are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that result will be an undue restraint of competition." *De Jong Packing Co. v. Dep't of Agriculture*, 618 F.2d 1329, 1331 (9th Cir. 1980). In *Spencer*, the Ninth Circuit did not purport to overrule *De Jong* or even to distinguish *Spencer* from *De Jong*. *De Jong* is the Ninth Circuit's most recent decision interpreting § 202. It therefore appears that the Ninth Circuit has held, consistent with the majority of other circuits, that § 202 requires a showing that defendant's actions had an anticompetitive effect.

Policy considerations also support the majority view that § 202 requires a showing of an anticompetitive effect. "Eliminating the competitive impact requirement would ignore the long-time antitrust policies which formed the backbone of the PSA's creation. Failure to require a competitive impact showing would subject dealers to liability under the

PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised." *London*, 410 F.3d at 1304.

In the absence of Sixth Circuit precedent on an issue, the Court may look for guidance in the case law from other federal circuits. *See NBBJ East Ltd. Partnership v. NBBJ Training Academy*, 201 F. Supp. 2d 800, 805 (S.D. Ohio 2001) (citing a Second Circuit decision on a question of law that the Sixth Circuit had not yet addressed); *Akers v. Bonifasi*, 629 F. Supp. 1212, 1222 (where neither the United States Supreme Court nor the Sixth Circuit had weighed in on an issue, the district court followed a "well-reasoned" opinion by the Fifth Circuit). In this case, the Court will follow the majority of the circuit courts which have addressed the issue in holding that § 202 requires a showing of anticompetitive effect in order to sustain a cause of action. The Court will thus examine Plaintiff's claim to determine whether he has asserted facts showing that Defendant's actions affected or were likely to affect competition.

Plaintiff asserts a number of wrongful acts by Defendant: denying him access to the scales while weighing his poultry (complaint ¶ 17), delaying placement of a flock of birds (*id.* ¶ 18), and terminating his grower's contract (*id.* ¶ 20). Plaintiff alleges that these acts were designed to thwart his efforts to organize growers and taken in retaliation for his complaints to the Packers & Stockyards Administration. (*Id.* ¶ 22.) Plaintiff claims monetary damages for the missed flock (*id.* ¶ 18) and claims that he has been unable to sell his farm due to Defendant's actions. (*Id.* ¶ 23.)

Plaintiff's complaint does not allege that Defendant's actions had an anticompetitive effect. Plaintiff focuses solely on how Defendant's action harmed him as an individual grower. He makes no allegations regarding the effect of Defendant's actions on the pricing of poultry or on overall competition in the poultry industry. *See London*, 410 F.3d at 1305 (listing possible evidence that plaintiff could have offered in support of claim of anticompetitive injury).

Plaintiff has therefore failed to assert that Defendant's wrongful actions affected or were likely to affect competition. Accordingly, his claims under the PSA must be dismissed for failure to state a claim upon which relief could be granted. *Eidson v. State of Tennessee Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007) ("[T]o survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory.") *See also Mims v. Cagle Foods JV, LLC*,148 Fed. App'x 762, 766 (11th Cir. 2005) ("Termination of a contract without economic justification is insufficient to sustain a claim under the PSA absent a showing of anticompetitive effect .")

Accordingly, Defendant's Motion to Dismiss [Court Doc. 10] is **GRANTED** with respect to Plaintiff's claim under the Packers and Stockyards Act. Plaintiff's claim under the Packers and Stockyards Acts is **DISMISSED WITH PREJUDICE**.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss [Court Doc. 10] is **GRANTED**. Plaintiff's claims are **DISMISSED WITH PREJUDICE**. Pursuant to 7 U.S.C. § 2305(c), Defendant **SHALL RECOVER** its attorney's fees incurred in defending against Plaintiff's claim under the Agricultural Fair Practices Act. In accordance with Rule 54(d)(2) of the Federal Rules of Civil Procedure, Defendant **SHALL FILE** a separate motion with supporting documentation outlining its attorney's fees no later than fourteen days after the entry of judgment in this case. Costs are taxed against the Plaintiff pursuant to Rule 54(d)(1). The Clerk shall close the case.

SO ORDERED this 9th day of April, 2008.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

Case No. 4:08-cv-3
Judge Mattice

ALTON T. TERRY,	)
	)
Plaintiff,	)
	)
v.	)
	)
TYSON FARMS, INC.,	)
	)
Defendant.	)
	)

JUDGMENT

This case came before the Court on the Motion to Dismiss by Defendant Tyson Farms, Inc. The Honorable Harry S. Mattice, United States District Judge, having rendered a decision on the Defendant's motion.

It is **ORDERED** and **ADJUDGED:**

that the plaintiff Alton T. Terry, take nothing, that the action be **DISMISSED WITH PREJUDICE**. Costs shall be taxed against the Plaintiff.

Dated at *Chattanooga, Tennessee*, this 9th day of April, 2008.

/s/ Patricia L. McNutt
PATRICIA L. McNUTT
CLERK OF COURT

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-5577

[Filed June 23, 2010]

ALTON T. TERRY,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
TYSON FARMS, INC.,	)
	)
Defendants-Appellee.	)
	)

BEFORE: NORRIS, COOK, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

Statute Sections

7 U.S.C. § 181 et seq. (2006):

§ 182. Definitions

(6) The term "poultry" means chickens, turkeys, ducks, geese, and other domestic fowl;

(7) The term "poultry product" means any product or byproduct of the business of slaughtering poultry and processing poultry after slaughter;

(8) The term "poultry grower" means any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or by another, but not an employee of the owner of such poultry;

(9) The term "poultry growing arrangement" means any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares for live poultry for delivery, in accord with another's instructions, for slaughter;

(10) The term "live poultry dealer" means any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another, if poultry is obtained by such person in commerce, or if poultry obtained by such

person is sold or shipped in commerce, or if poultry products from poultry obtained by such person are sold or shipped in commerce; and

§ 192. Unlawful practices enumerated

It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person

(1) to apportion territory for carrying on business, or
(2) to apportion purchases or sales of any article, or
(3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

§ 208. Unreasonable or discriminatory practices generally; rights of stockyard owner of management and regulation

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the

purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer from rendering service on other markets or in occasional and incidental off-market transactions.

§ 209. Liability to individuals for violations; enforcement generally

(a) If any person subject to this chapter violates any of the provisions of this chapter, or of any order of the Secretary under this chapter, relating to the purchase, sale, or handling of livestock, the purchase or sale of poultry, or relating to any poultry growing arrangement or swine production contract, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either

(1) by complaint to the Secretary as provided in section 210 of this title, or

(2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

§ 213. Prevention of unfair, discriminatory, or deceptive practices

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

§ 228b–1. Final date for making payment to cash seller or poultry grower

(a) Delivery of full amount due

Each live poultry dealer obtaining live poultry by purchase in a cash sale shall, before the close of the next business day following the purchase of poultry, and each live poultry dealer obtaining live poultry under a poultry growing arrangement shall, before the close of the fifteenth day following the week in which the poultry is slaughtered, deliver, to the cash seller or poultry grower from whom such live poultry dealer obtains the poultry, the full amount due to such cash seller or poultry grower on account of such poultry.

(b) Delay or attempt to delay collection of funds as "unfair practice"

Any delay or attempt to delay, by a live poultry dealer which is a party to any such transaction, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for poultry obtained by poultry growing arrangement or purchased in a cash sale, shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

(c) Definition of cash sale

For the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer.

§ 228b–2. Violations by live poultry dealers

(a) Written complaint by Secretary; hearing; intervention; amended complaint

Whenever the Secretary has reason to believe that any live poultry dealer has violated or is violating any provision of section 197 of this title or section 228b–1 of this title, he shall cause a complaint in writing to be served upon the live poultry dealer, stating his charges in that respect, and requiring the live poultry dealer to attend and testify at a hearing at a time and place designated therein, at least 30 days after the service of such complaint; and at such time and place there shall be afforded the live poultry dealer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. Any person for good cause shown may, on application, be allowed by the Secretary to intervene in such proceeding, and appear in person or by counsel. At any time prior to the close of the hearing, the Secretary may amend the complaint; but in case of any amendment adding new charges, the hearing shall, on the request of the live poultry dealer, be adjourned for a period not exceeding 15 days.

(b) Report on findings of fact by Secretary; cease and desist order; assessment of civil penalty; action by Attorney General upon live poultry dealer's failure to pay penalty

If, after such hearing, the Secretary finds that the live poultry dealer has violated, or is violating, any

provisions of section 197 of this title or section 228b–1 of this title covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the live poultry dealer an order requiring such live poultry dealer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture. The Secretary may also assess a civil penalty of not more than $20,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business: Provided, however, That in no event can the penalty assessed by the Secretary take priority over or impede the ability of the live poultry dealer to pay any unpaid cash seller or poultry grower. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General, who may recover such penalty by an action in the appropriate District Court of the United States.

(c) Amendment or setting aside of report or order

Until the record in such hearing has been filed in a court of appeals of the United States, as provided in section 228b–3 of this title, the Secretary, at any time, upon such notice and in such manner as he deems proper, but only after reasonable opportunity to the live poultry dealer to be heard, may amend or set aside the report or order, in whole or in part.

(d) Service of complaints, orders, and other processes

Complaints, orders, and other processes of the Secretary under this section may be served in the same manner as provided in section 45 of title 15.

§ 228b–4. Violation of final order by live poultry dealer; penalty

Any live poultry dealer, or any officer, director, agent, or employee of a live poultry dealer, who fails to obey any order of the Secretary issued under the provisions of section 228b–2 of this title, or such order as modified--

(1) after the expiration of the time allowed for filing a petition in the court of appeals to set aside or modify such order, if no such petition has been filed within such time;

(2) after the expiration of the time allowed for applying for a writ of certiorari, if such order, or such order as modified, has been sustained by the court of appeals and no such writ has been applied for within such time; or

(3) after such order, or such order as modified, has been sustained by the courts as provided in section 228b–3 of this title;

shall on conviction be fined not less than $1,000 nor more than $20,000. Each day during which such failure continues shall be deemed a separate offense.

7 U.S.C. § 197b (Supp. II 2008). Choice of law and venue

(a) Location of forum

The forum for resolving any dispute among the parties to a poultry growing arrangement or swine production or marketing contract that arises out of the arrangement or contract shall be located in the Federal judicial district in which the principle part of the performance takes place under the arrangement or contract.

(b) Choice of law

A poultry growing arrangement or swine production or marketing contract may specify which State's law is to apply to issues governed by State law in any dispute arising out of the arrangement or contract, except to the extent that doing so is prohibited by the law of the State in which the principal part of the performance takes place under the arrangement or contract.

List of Amendments to 1921 PSA

United States Department of Agriculture

Grain Inspection, Packers and Stockyards Administration

Packers and Stockyards Program

Packers and Stockyards Act, 1921, enacted August 15, 1921 (42 Stat. 159) and amended and supplemented by the following acts of Congress:

May 5, 1926 (44 Stat. 397)
June 7, 1934 (48 Stat. 926)
August 14, 1935 (49 Stat. 648)
August 10, 1939 (53 Stat. 1351)
June 19, 1942 (56 Stat. 372)
July 12, 1943 (57 Stat. 422)
June 25, 1948 (62 Stat. 909 and 991)
May 24, 1949 (63 Stat. 107)
August 28, 1958 (72 Stat. 944, Pub. L. 85-791)
September 2, 1958 (72 Stat. 1749, Pub. L. 85-909)
July 8, 1963 (77 Stat. 79)
July 31, 1968 (82 Stat. 474, Pub. L. 90-446)
September 13, 1976 (90 Stat. 1249, Pub. L. 94-410)
October 2, 1978 (92 Stat. 886, Pub. L. 95-409)
November 23, 1987 (101 Stat. 917, Pub. L. 100-173)
October 13, 1994 (108 Stat. 3178, Pub. L. 103-354)
October 22, 1999 (113 Stat. 1210, Pub. L. 106-78)
November 9, 2000 (114 Stat. 2077, Pub. L. 106-472)
May 13, 2002 (116 Stat. 134, Pub. L. 107-171)
November 2, 2002 (116 Stat. 1921, Pub. L. 107-273)
December 3, 2004 (118 Stat. 2635, Pub. L. 108-444)
October 5, 2006 (120 Stat. 1464, Pub. L. 109-296)
June 18, 2008 (122 Stat. 1651, Pub. L. 110-246)

NOTE: Congress directed agencies to update the civil penalties every 4 years.
Effective September 2, 1997, 7 CFR 3.91, amended the civil penalties, as required by Pub. L. 101-410 and 104-134. (Updated as of May 7, 2010).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

CIVIL ACTION
FILE NO. 4:08-cv-3
Mattice/[ ]

JURY TRIAL DEMANDED

[Filed January 7, 2008]

ALTON T. TERRY,	)
	)
Plaintiff,	)
	)
v.	)
	)
TYSON FARMS, INC.,	)
	)
Defendant.	)
	)

COMPLAINT

Comes now, **ALTON T. TERRY**, Plaintiff herein, and files his Complaint against **TYSON FARMS, INC.**, Defendant herein, by showing to this Court as follows:

I.

PARTIES

1. Plaintiff, **ALTON T. TERRY**, is a resident of Moore County, Tennessee. Plaintiff was formerly engaged in the business of raising broiler poultry under a poultry growing arrangement with Defendant, **TYSON FARMS, INC.**

2. Defendant, **TYSON FARMS, INC.**, (hereinafter "Tyson") is engaged in the business of selling processed poultry products in interstate commerce. Defendant is incorporated in the State of North Carolina, and has its principal place of business in Springdale, Arkansas. Defendant maintains an office and transacts business in Bedford County, Tennessee.

II.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter because Plaintiff's claims arise under the Unfair Trade Practices Effecting Producers of Agricultural Products Act ("Agricultural Fair Practices Act of 1967"), 7 U.S.C. § 2301, et seq., and under the Packers & Stockyards Act of 1921, as amended by Section 5 of the Poultry Producers' Financial Protection Act of 1987, 7 U.S.C. § 209.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, as the claims of the Plaintiff arose within this district, and the Defendant is a corporation presently doing business within this district.

III.

FACTUAL ALLEGATIONS

5. In 2000, Plaintiff became interested in purchasing a poultry farm, which included a residence, five poultry houses and other outbuildings, and 12.64 acres.

6. Before purchasing the farm, Plaintiff did extensive research on the poultry business and the law governing poultry companies. Plaintiff also looked at the seller's production records and spoke with Mr. Mike Brown, production manager at Tyson's Shelbyville complex, about the company's intent to continue placement of birds.

7. Mr. Brown assured Plaintiff that the farm was in good condition, and was a top producing farm. Mr. Brown also assured Plaintiff that the facility and equipment were in excellent condition and suitable for growing chickens. Plaintiff was led to believe by Mr. Brown that the farm Plaintiff was purchasing would need no substantial improvements in the near future.

8. In the summer of 2001, Plaintiff, his three children, and his wife moved into the residence, and Plaintiff took over management of the flock then on the farm.

9. After Plaintiff started growing chickens, he became aware of many problems growers were having with Tyson and other poultry integrators. Plaintiff began doing extensive research to better understand the nature of the relationship between poultry integrators and contract growers.

10. In 2002, Plaintiff attended a conference in North Carolina with other contract growers, attorneys representing growers, and representatives of farmer organizations. The purpose of the conference was to address problems growers were facing in their dealings with companies, and to provide guidelines on organizing grower associations.

11. After attending the meeting in North Carolina, Plaintiff became actively involved in trying to organize poultry growers in his area. Plaintiff also provided input to state regulators and legislators concerning confined animal feeding operations (CAFO regulations).

12. In 2003 and 2004, Plaintiff organized and attended several meetings of poultry growers in his area. In September of 2004, Plaintiff was elected as chairman of the directors for the Tennessee Poultry Growers Association.

13. As an officer in the Poultry Growers Association, Plaintiff gathered information from other growers about problems they were having with Tyson. Plaintiff repeatedly reported these complaints to Brett Offut, Office of Policy & Litigation with the Packers & Stockyards Administration in Washington, D.C.

14. As an officer in the Poultry Growers Association, Plaintiff also educated other growers about federal laws prohibiting abuse of growers in the poultry industry.

15. At the meeting Plaintiff attended in North Carolina, Plaintiff was provided four tapes of various broadcasts reporting on problems in the poultry

industry. Plaintiff took the tapes, consolidated the broadcasts into one tape, and had multiple copies made to give to growers in his complex.

16. While growing chickens for Tyson, Plaintiff became concerned that his poultry was not being weighed upon arrival at the plant as required by his contract and federal regulations.

17. Plaintiff attempted to watch his birds being weighed on several occasions. In August of 2004 and December of 2004, Plaintiff went to the plant and was denied access. He complained to Brett Ofutt at the Office of Policy & Litigation in Washington, D.C. and asked that a letter be sent out to Tyson Foods, Inc. On February 13, 2005, Plaintiff followed the truck loaded with birds from his farm to the processing plant. When he arrived at the plant at 2:00 a.m., he was told that his birds would not be weighed until after 4:00 a.m. when the "yard dog" came in. When Plaintiff returned at 4:00 a.m., he was once again denied access to the plant.

18. Plaintiff called Steve Warrilow, an agent with the Grain Inspection Packers & Stockyards Administration. Mr. Warrilow told Plaintiff that he was in route to the plant and would find out why Plaintiff was denied access to observe the weighing of his birds. Later that week, Plaintiff met with Tyson managers, Mark Harmon, Michael Sheets, and Rick Curtis. Following that meeting, the company delayed placement of birds for a full flock rotation, costing Plaintiff $30,000.00 in lost compensation. When Plaintiff met with company managers, Mark Harmon, Chip Miller, and Michael Sheets on March 28, 2005, he

was told that it was "a company decision" not to place birds after Plaintiff made the weighing complaint.

19. Plaintiff asked for compensation for the damages he lost as a result of the missed flock, and was told by Mark Harmon, Michael Sheets, and the regional manager, that the company had decided that they were not going to pay Plaintiff for the missed flock.

20. On January 11, 2006, Plaintiff was notified by mail that his contract would not be renewed. At the time Tyson informed Plaintiff that the company would not continue placement of birds on his farm, Plaintiff was well above average in the grower rankings, and was a successful producer of broiler poultry.

21. The reasons given by Tyson for termination of Plaintiff's contract were that Plaintiff had failed to make costly and unnecessary changes to his poultry operating, and Plaintiff's alleged "confrontational" behavior toward Tyson representatives.

22. The reasons provided by Tyson for termination of Plaintiff's contract were false and pretextual to disguise Tyson's real reason, which was to thwart Plaintiff's efforts to organize growers, and in retaliation for Plaintiff's complaints to the Packers & Stockyards Administration.

23. Since termination of Plaintiff's contract on January 11, 2006, Plaintiff has had the farm advertised for sale, but has been unable to sell the farm due to Tyson's demands for costly upgrades before agreeing to place birds.

COUNT ONE

AGRICULTURAL FAIR PRACTICES ACT

24. Plaintiff hereby realleges and incorporates paragraphs one (1) through twenty-five (25) above as if set out verbatim hereunder.

25. Plaintiff is a producer, pursuant to 7 U.S.C. § 2302(b), and Defendant is a handler, within the meaning of § 2302(a) of the Agricultural Fair Practices Act.

26. Defendant violated 7 U.S.C. § 2303 in knowingly permitting its employee or agent to coerce and intimidate Plaintiff in the exercise of his right to join and belong to an association of producers and by discriminating against Plaintiff with respect to the quantity and quality of poultry and feed supplied to Plaintiff because of his membership in an association of producers. Plaintiff was injured in his business and property by reason of Defendant's violation.

27. As a result of Defendant's violation of 7 U.S.C. § 2303, Plaintiff is entitled to damages, including reasonable attorney's fees pursuant to 7 U.S.C. § 2305(c).

COUNT TWO

PACKERS & STOCKYARDS ACT

28. Plaintiff realleges and incorporates paragraphs one (1) through twenty-seven (27) above as if set out verbatim hereunder.

29. Defendant violated the Packers & Stockyards Act, 7 U.S.C. § 181 et seq., by engaging in unfair, unjustly discriminatory, or deceptive practices or devises in violation of § 202 of the Packers & Stockyards Act, 7 U.S.C. § 192(a); and by subjecting Plaintiff to undue or unreasonable prejudice or disadvantage in violation of 7 U.S.C. § 192(b).

30. Each of the above violations of the Packers & Stockyards Act entitles Plaintiff to damages pursuant to 7 U.S.C. § 209.

WHEREFORE, Plaintiff prays for relief and judgment against the Defendant follows:

(a) That Plaintiff have judgment against Defendant in the total amount of all damages suffered by Plaintiff as a result of Defendant's violation of the Agricultural Fair Practices Act, 7 U.S.C. § 2301 et seq.;

(b) That Plaintiff have judgment against Defendant for all damages allowed under the Packers & Stockyards Act, 7 U.S.C. § 209;

(c) That Plaintiff have judgment against Defendant for all costs and reasonable attorney's fees;

(d) That Plaintiff be awarded pre-judgment interest; and

(e) That Plaintiff have such other and further relief as this Court deems proper.

Respectfully submitted this 3rd day of January, 2008.

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No. 10-542

IN THE

Supreme Court of the United States

ALTON T. TERRY,

Petitioner,

v.

TYSON FARMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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December 22, 2010

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QUESTIONS PRESENTED

1. Under subsections 202(a) and (b) of the Packers and Stockyards Act, 7 U.S.C. § 192(a), (b), did the court of appeals correctly conclude, given the language, context, and purpose of the Act as an antitrust law, that a plaintiff must plead and prove an anticompetitive effect from the defendant's challenged conduct?

2. Whether the court of appeals correctly declined to give *Chevron* deference to the Secretary of Agriculture's interpretation of subsections 202(a) and (b) of the Packers and Stockyards Act, 7 U.S.C. § 192(a), (b), when the federal courts of appeals previously have held that Congress's intention in these subdivisions was clear from their plain language?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Tyson Farms, Inc. is a wholly-owned subsidiary of Tyson Foods, Inc. No publicly held company owns 10% or more of Tyson Foods, Inc.

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INTRODUCTION

Petitioner cannot demonstrate a conflict among the federal courts of appeals on whether subsections 202(a) and (b) of the Packers and Stockyards Act ("PSA"), 7 U.S.C. § 192(a), (b), require a plaintiff to plead and prove an injury to competition. In the decision below, the Sixth Circuit noted that "seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results." Pet. App. 11a. And the court below specifically joined this "tidal wave" of authority, *id.* at 10a, explaining that "the vast body of cohesive precedent" made the "construction of this nearly 90-year old statute ... a matter of settled law," *id.* at 14a.

Given the uniform agreement among the courts of appeals on this issue, petitioner can merely raise the same statutory interpretation arguments that the Sixth Circuit and seven other circuit courts have now rejected. Petitioner would read the terms of subsections 202(a) and (b) of the Act without regard to the context or purpose of the PSA. But this contravenes basic principles of statutory construction. *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 486 (2006). As this Court has recognized, the PSA is an antitrust statute through which Congress intended to stop practices that hindered competition in the meat packing industry. Indeed, the specific terms used—unfair, unjustly discriminatory, or unreasonable preferences—were borrowed from prior antitrust legislation at a time when this Court interpreted those terms to require a consideration of competition in assessing a violation of these laws. The settled interpretation of subsections 202(a) and (b) does not warrant this Court's intervention.

The Court should also decline to address the second question presented because the court below did not pass on the question whether the Secretary of Agriculture's interpretation of subsections 202(a) and (b) deserves *Chevron* deference. As a result, the question is not properly presented here. In all events, petitioner has raised no conflict among the courts on this issue. That is because *Chevron* deference is unwarranted. The federal courts of appeals have long held that the plain language of subsections 202(a) and (b)—which further Congress's antitrust aims, and which incorporate language from prior antitrust legislation—require that a challenged action have an anticompetitive effect.

The Court should deny the petition.

STATEMENT OF THE CASE

1. Tyson Farms, Inc. is the nation's largest poultry processing firm. Pet. App. 2a. To produce its poultry products, Tyson contracts with independent growers to raise Tyson's broiler chickens. *Id.* at 4a. Under these contracts, Tyson supplies the chicks, feed, and technical advice. *Id.* The grower provides farm facilities, farm equipment, utilities, labor, and know-how to raise the chicks to a target weight, at which point the matured birds are returned to Tyson for processing. *Id.*

In 2001, petitioner purchased a poultry-growing farm from one of Tyson's independent growers in Tennessee and took over management of the farm's poultry flock. Pet. App. 5a, 35a. According to petitioner's complaint, he soon learned of problems that growers had with Tyson and other poultry integrators. *Id.* at 5a, 35a. After attending a conference in 2002 addressing these problems, petitioner allegedly began trying to organize growers

in his area. *Id.* at 5a, 35a-36a. In 2004, he was elected chairman and director of a Tennessee-based growers association. *Id.* at 5a, 36a. In this role, petitioner catalogued and reported grower complaints against Tyson and educated growers about their rights. *Id.*

Petitioner alleged that as a grower he became concerned that Tyson was not promptly weighing his poultry upon arrival at Tyson's plant. Pet. App. 5a, 36a. On two different occasions in 2004, Tyson supposedly denied petitioner access to its plant, in violation of federal regulations, when he attempted to watch the weighing of his birds. *Id.* at 5a-6a, 36a; 9 C.F.R. § 201.108-1(e)(4) (poultry growers are entitled to observe weighing).

Petitioner alleges that in 2005 he again unsuccessfully attempted to observe the weighing of his chickens at Tyson's plant. Pet. App. 6a, 36a. According to his complaint, he arrived at 2:00 a.m. with his delivery of poultry but was informed that his birds would not be weighed until after 4:00 a.m. *Id.* When he returned at 4:00 a.m., Tyson supposedly denied him access to the plant. *Id.*

Later in the week, petitioner met with local Tyson managers. Pet. App. 6a, 37a. Afterward, Tyson allegedly delayed placement of broilers with petitioner for a full flock rotation, costing him $30,000 in lost compensation. *Id.* At a second meeting with Tyson's managers, petitioner learned of Tyson's "'company decision'" to discontinue placement of birds at his farm. *Id.* In early 2006, Tyson informed petitioner that it would not renew its contract with him.

2. Petitioner sued Tyson in January 2008. Pet. App. 37a. He alleged that Tyson violated the Agricultural Fair Practices Act, 7 U.S.C. § 2301 *et*

seq., by discriminating against him based on his membership in an association of producers. Pet. App. 37a. He also alleged that Tyson violated subsections 202(a) and (b) of the PSA, 7 U.S.C. § 192(a), (b), by refusing to allow petitioner to observe the weighing of his poultry, delaying placement of his flock, and terminating his contract. Pet. App. 37a-38a, 49a.

The district court granted Tyson's motion to dismiss both causes of action. It agreed that petitioner's Tennessee-based growers association was not an "association of producers" as that term was defined at the time in the Agricultural Fair Practices Act. Pet. App. 44a-45a.

The district court also agreed that petitioner failed to state a claim under the PSA because he failed to allege that Tyson's allegedly "wrongful actions affected or were likely to affect competition." Pet. App. 50a. The court agreed that the terms "unfair, unjustly discriminatory, or deceptive practice or device" in subsection 202(a) of the Act, 7 U.S.C. § 192(a), and "undue or unreasonable preference or advantage" in subsection 202(b), *id.* § 192(b), must be read in light of Congress's purpose in passing the PSA, namely to curb the destruction of competition in the packing industry. Pet. App. 46a-47a. Accordingly, the trial court concurred with every other federal court of appeals that has "addressed the issue in holding that § 202 requires a showing of anticompetitive effect in order to sustain a cause of action." *Id.* at 47a, 49a.

In so holding, the district court analyzed and rejected petitioner's argument that there is a circuit split on this issue. Pet. App. 48a. The court explained that, contrary to petitioner's argument, the Ninth Circuit's decision in *Spencer Livestock Commission Co.* v. *Department of Agriculture*, 841 F.2d 1451, 1455

(9th Cir. 1988), could not create a circuit split on whether section 202 requires a showing of anticompetitive effect because that decision addressed section 213 of the PSA, not section 202. Pet. App. 48a. According to the court, "the Ninth Circuit has held, consistent with the majority of other circuits, that § 202 requires a showing that defendant's actions had an anticompetitive effect." *Id.* at 48a (discussing *De Jong Packing Co.* v. *Dep't of Agriculture*, 618 F.2d 1329, 1331 (9th Cir. 1980)).

After examining petitioner's complaint in the light most favorable to him, the district court concluded the "complaint does not allege that [Tyson's] actions had an anticompetitive effect" as required by a long line of precedent. Pet. App. 50a. Instead, petitioner "focuses solely on how [Tyson's] action harmed him as an individual grower." *Id.* Accordingly, petitioner failed to allege that Tyson's actions "affected or were likely to affect competition" as required by subsections 202(a) and (b).

3. Petitioner appealed to the Sixth Circuit, challenging, among others, the district court's conclusion that subsections 202(a) and (b) required him to plead that Tyson's actions had an effect on competition. Pet. App. 7a-8a. The Sixth Circuit affirmed. *Id.* at 8a, 15a. It noted that this issue "is not novel to other courts" and "has been addressed by seven ... sister circuits, with consonant results." *Id.* at 8a. As the court explained, "[a]ll of these courts of appeals unanimously agree that an anticompetitive effect is necessary for an actionable claim under subsections (a) and (b)." *Id.*

After examining the "rationale employed by [its] sister circuits," the Sixth Circuit found the decisions "well-reasoned and grounded on sound principles of statutory construction." Pet. App. 14a. The court of

appeals thus chose to join what it characterized as a "tidal wave" of authority on this issue, *id.* at 10a, and specifically declined petitioner's invitation to "deviate from the course taken by the seven other circuits that have spoken on this issue, thus creating a conflict." *Id.* at 12a. The Sixth Circuit held "that in order to succeed on a claim" under subsections 202(a) or (b) of the PSA, "a plaintiff must show an adverse effect on competition." *Id.* at 14a.

REASONS FOR DENYING THE PETITION

Petitioner makes no effort to allege any conflict among the federal courts of appeals on the first question presented. Nor could he. As the Sixth Circuit recognized, the federal circuit courts to address the issue have unanimously agreed that subsections 202(a) and (b) of the PSA require a plaintiff to demonstrate an anticompetitive effect from the defendant's challenged conduct. Petitioner thus cannot present any disagreement or lack of uniformity that warrants this Court's attention. On that basis alone, the Court should deny the petition.

Petitioner's arguments on the merits do not warrant this Court's intervention, especially when, as the Sixth Circuit acknowledged, "the construction of this nearly 90-year-old statute [is] a matter of settled law." Pet. App. 14a. Petitioner's entire argument requires reading subsections 202(a) and (b) without considering the context or purpose of the PSA. That approach contravenes settled principles of statutory interpretation, which require courts to "consider[ ] the purpose and context of the statute, and [to] consult[ ] any precedents or authorities that inform the analysis." *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 486 (2006). This Court has explained that the PSA is an antitrust law through which

Congress intended to target practices that hinder competition. Indeed, the specific terms of subsections 202(a) and (b) originated in prior antitrust legislation, which this Court had interpreted to require a consideration of competition.

The second question presented likewise does not warrant this Court's review. The Sixth Circuit did not pass on the issue, which makes this case a poor vehicle for raising the question in this Court. Moreover, the lower courts are in agreement on the issue. Every court of appeals to consider this issue has correctly refused to give *Chevron* deference to the Secretary of Agriculture's interpretation of subsections 202(a) and (b). Nor is any deference warranted, because the competitive injury requirement under these subsections arises from the clearly expressed intention of Congress.

The petition should be denied.

I. CERTIORARI IS UNWARRANTED BECAUSE THE FEDERAL COURTS OF APPEALS UNIFORMLY REQUIRE A SHOWING OF ACTUAL OR THREATENED COMPETITIVE INJURY UNDER SUBSECTIONS 202(a) AND (b) OF THE PSA.

Petitioner cannot demonstrate a need for this Court's intervention because every federal court of appeals to address whether subsections 202(a) and (b) of the PSA require a showing of competitive injury has held that they do. As the Sixth Circuit recognized, "seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results." Pet. App. 11a. With the Sixth Circuit joining this "tidal wave" of authority, *id.* at 10a, eight circuits now uniformly require proof of

competitive injury under subsections 202(a) and (b). Given this cohesion among the circuit courts, the Court should deny the petition on this basis alone.

A. The Sixth Circuit Has Joined Every Other Federal Circuit Court That Has Addressed This Issue In Holding That Subsections 202(a) And (b) Require A Showing Of An Anticompetitive Effect From The Challenged Conduct.

Starting with the Seventh Circuit, the federal courts of appeals have consistently required a showing of anticompetitive effect to establish a violation of subsections 202(a) and (b) of the PSA. The Seventh Circuit first addressed the meaning of subsections (a) and (b) more than seventy years ago, in *Swift & Co.* v. *Wallace*, 105 F.2d 848 (7th Cir. 1939). In *Swift*, the court of appeals set aside a finding by the Secretary of Agriculture ("Secretary") that charging different prices was unjustly discriminatory or unreasonable under subsections 202(a) and (b). *Id.* at 857. The court held that the Secretary erred by failing to consider the influence of or effect upon competition from these practices. *Id.* at 854, 857. The court explained that subsections 202(a) and (b) of the PSA must be interpreted consistently with similarly worded provisions of other antitrust legislation, such as the Interstate Commerce Act. *Id.* at 856-57.

The Seventh Circuit solidified its interpretation of subsections 202(a) and (b) in *Armour & Co.* v. *United States*, 402 F.2d 712 (7th Cir. 1968). There, the court again set aside a determination by the Secretary because the Secretary "erroneously construed" subsections 202(a) and (b). *Id.* at 727. The court explained that the PSA was an antitrust law designed to halt the destruction of competition in the

meat packing industry and that Congress had used familiar terms from prior antitrust legislation. *Id.* at 717, 720 (citing H.R. No. 66-1297, at 11 (1921)). This "statutory language," according to the court, "enjoin[s] the Department and courts to apply *a rule of reason* in determining the lawfulness of a particular practice under Section 202(a) and (b)." *Id.* at 717 (emphasis added). That is, liability under these provisions requires a showing of "intent to eliminate competition or ... the effect of ... lessen[ing] competition." *Id.* at 720, 725-26; see also *Pac. Trading Co.* v. *Wilson & Co.*, 547 F.2d 367, 369 (7th Cir. 1976).

Since *Armour*, the federal courts of appeals that have addressed this issue have uniformly agreed with the Seventh Circuit, holding that a violation of subsections 202(a) and (b) requires a showing that the challenged conduct has an actual or likely effect on competition. In 1980, the Ninth Circuit agreed with the Seventh Circuit's reading of section 202. In *De Jong Packing Co.* v. *USDA*, 618 F.2d 1329 (9th Cir. 1980), the court affirmed the Secretary's finding that a conspiracy to "coerce a change in marketing practices by concerted action" violated subsection 202(a). *Id.* at 1335. The court explained that "§ 202 of the Packers and Stockyards Act may have been made broader than antecedent antitrust legislation [but] it nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation." *Id.* at 1335 n.7. Relying on *Armour*, the court therefore followed "the courts that have considered § 202 [and] have consistently looked to decisions under the Sherman Act for guidance." *Id.*; see also *id.* at 1335-36. The Ninth Circuit then concluded, consistent with the Seventh Circuit, that "unfair practices under § 202 are not confined to

those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint on competition." *Id.* at 1337.

Five years later, the Eighth Circuit first considered whether section 202 requires a showing of anticompetitive harm. In dicta, the court stated that subsection 202(a) "authorize[s] the Secretary of Agriculture to regulate anticompetitive trade practices in the ... meat industry in accord with 'the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation.'" *Farrow* v. *USDA*, 760 F.2d 211, 214 (8th Cir. 1985) (quoting *De Jong Packing*, 618 F.2d at 1335 n.7). The Eighth Circuit later confirmed the plain import of this reasoning—that subsection 202(a) and (b) require a showing of actual or potential anticompetitive harm. *IBP, Inc.* v. *Glickman*, 187 F.3d 974 (8th Cir. 1999). In *IBP*, the court followed its earlier statements in *Farrow*, reviewing only whether the record supported a USDA finding that particular practices had "the effect or potential effect of suppressing or reducing competition." *Id.* at 976-77. Because substantial evidence did not support a finding of actual or potential anticompetitive effect, the court vacated the USDA's decision. *Id.* at 977, 978.

The Fourth Circuit in an unpublished decision briefly addressed this issue in 1998. In *Philson* v. *Goldsboro Milling Co.*, 164 F.3d 625 (4th Cir. 1998), *available at* 1998 WL 709324, the court of appeals considered whether a district court had properly instructed the jury on claims under subsection 202(a). The court of appeals held that while this subsection does not necessarily require proof of "*actual* injury ... a plaintiff must nonetheless establish that

the challenged act is *likely* to produce the type of injury that the Act was designed to prevent." *Id.* at *4.

Consistent with these other circuits, the Eleventh Circuit held in 2005 "that in order to prevail under [subsections 202(a) or (b) of the] PSA, a plaintiff must show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition." *London* v. *Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005). The Eleventh Circuit specifically joined the other circuits that have addressed this issue, construing subsections 202(a) and (b) in light of the purpose of the PSA—*i.e.*, "halting a general course of action for the purpose of destroying competition." *Id.* at 1302 (quoting *Armour*, 402 F.2d at 720) (internal quotation marks omitted). The court noted the absurdity of construing these subsections without considering the context and purpose of the PSA: "Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised." *Id.* at 1304. The Eleventh Circuit reaffirmed its adherence to this rule in *Pickett* v. *Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005).

The Tenth Circuit joined its sister circuits in *Been* v. *O.K. Industries, Inc.*, 495 F.3d 1217 (10th Cir. 2007). There, the court held that subsection 202(a) "requires a plaintiff who claims that a defendant's conduct was 'unfair' to show that such conduct results in or is likely to result in an injury to competition." *Id.* at 1238. In harmony with the other circuits on this issue, the Tenth Circuit read section 202 in light of its purpose, *id.* at 1228, and rejected the argument (raised anew by petitioner) that because subsections

(c), (d), and (e) of section 202 specifically prohibit practices that restrain commerce or create monopolies, "the absence of similar language in § 202(a) conclusively means that proof of a competitive injury is not required," *id.* at 1229. The court read subsection 202(a) as a "catchall" because Congress "could not list the full panoply of unfair, unjustly discriminatory, or deceptive practices or devices" that it intended to prohibit. *Id.*

The last circuit to address this issue before the court below was the Fifth Circuit. In *Wheeler* v. *Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc), the Fifth Circuit sitting en banc ruled that to "support a claim that a practice violates" subsections 202(a) or (b), "there must be proof of injury, or likelihood of injury, to competition." *Id.* at 363. Like the other circuits to address this topic, the Fifth Circuit concluded that section 202 must be construed according to the "'whole statutory text, considering the purpose and ... precedents or authorities that inform the analysis.'" *Id.* (quoting *Dolan*, 546 U.S. at 486). Also, after examining the numerous decisions from the courts of appeals, the Fifth Circuit noted that "up to 2002, Congress has amended [section 202] seven times without making any changes that would affect the many court interpretations." *Id.* at 361. Accordingly, the Fifth Circuit concluded that "congressional silence in response to circuit unanimity 'after years of judicial interpretation supports adherence to the traditional view.'" *Id.* at 362 (quoting *Gen. Dynamics Land. Sys., Inc.* v. *Cline*, 546 U.S. 581, 593-94 (2004)).

The decision below explicitly joined these circuits, holding "that in order to succeed on a claim under [subsections 202(a) and (b),] a plaintiff must show an adverse effect on competition." Pet. App. 14a. The

Sixth Circuit based its holding on the view that "the rationale employed by our sister circuits is well-reasoned and grounded on sound principles of statutory construction." *Id.* The court also "deem[ed] the construction of this nearly 90-year-old statute to be a matter of settled law." *Id.*

Because the Sixth Circuit's decision is consistent with the unanimous decisions of the other circuit courts, and because all of the circuit courts that are likely to address this issue have spoken, the Court should deny the petition.

B. Petitioner Cannot Demonstrate A Conflict That Warrants This Court's Review.

Despite the uniform construction of section 202 by the courts of appeals, petitioner suggests that two conflicts warrant intervention by this Court. Pet. 17, 19, 24. This argument is incorrect.

1. Petitioner argues that the Sixth Circuit erroneously disregarded "the Ninth Circuit's conflicting decision in *Spencer Livestock*." Pet. 24. As petitioner implicitly—and the district court below explicitly—acknowledges, the Ninth Circuit's decision in *Spencer Livestock* cannot create a conflict on the issue presented because that case dealt with section 213 of the PSA, not section 202. *Id.* at 19, 24 (acknowledging that *Spencer Livestock* dealt with section 213); Pet. App. 48a. Rather, in conformity with the other circuits addressing the meaning of section 202, the Ninth Circuit in *De Jong Packing* held that a claim under section 202 requires a

showing of actual or likely injury to competition. 618 F.2d at 1337; see also *id.* at 1335 n.7.[1]

Petitioner's veiled attempt at undercutting the Ninth Circuit's holding in *De Jong Packing* is unavailing. In a brief sentence and a footnote, petitioner tries to incorporate a dissenting opinion from *Wheeler* v. *Pilgrim's Pride Corp.*, in which Judge Garza argued that decisions from the Eighth and Ninth Circuits can be read in a manner that does not join the other circuits in uniformly construing subsections 202(a) and (b). Pet. 24 & n.20. Petitioner's argument fails.

In dissenting from the majority in *Wheeler*, Judge Garza tried to distinguish *De Jong Packing* by suggesting that the Ninth Circuit "did not hold that the PSA *only* prohibits anticompetitive conduct." *Wheeler*, 591 F.3d at 381. As the majority in *Wheeler* recognized, this argument is mistaken. The Ninth Circuit specifically stated that the PSA "incorporates the basic antitrust blueprint" of "other pre-existing antitrust legislation" and followed the approach taken by the Seventh Circuit in *Armour*, which required an actual or likely injury to competition. *De Jong Packing*, 618 F.2d at 1335 n.7. More importantly, the Ninth Circuit specifically held that "unfair practices under § 202 are not confined to those where competitive injury has already resulted,

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[1] As the district court recognized, there is no conflict between the Ninth Circuit's decisions in *Spencer Livestock* and *De Jong Packing*. Moreover, even if there were tension between these holdings, that would be a matter for the Ninth Circuit sitting en banc, *see* Fed. R. App. P. 35(a)(1), not this Court, especially when the Ninth Circuit's standard under section 202 is consistent with the standard in every other federal court of appeals to address the issue.

but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint on competition." *Id.* at 1337. The only tenable reading of this holding is that a showing of either actual or likely harm to competition is necessary under section 202. Had the court intended to suggest that no demonstration of injury to competition is necessary at all—as petitioner contends here—it would have done so directly, rather than list the two harms actionable under this provision.

Similarly, petitioner mistakenly asserts that the Eighth Circuit's decision in *IBP* v. *Glickman* was equivocal. Pet. 24 & n.20 (citing *Wheeler*, 591 F.3d at 381 (Garza, J. dissenting)). Petitioner claims that the Eighth Circuit merely suggested that a showing of actual or likely harm to competition may be sufficient under section 202, but did not indicate it was necessary. *Id.* That too is wrong. In *IBP*, the Eighth Circuit explicitly followed its earlier statements in *Farrow* that a showing of either an actual or likely effect on competition is necessary under the Act. *IBP*, 187 F.3d at 977. Because there was insufficient evidence that the practice there actually or would "potentially suppress or reduce competition," the Eighth Circuit vacated the USDA's decision. *Id.*

2. Petitioner's second alleged conflict likewise does not warrant this Court's intervention. Petitioner argues that the Secretary of Agriculture's interpretation of section 202 in various Agriculture Decisions conflicts with those of the unanimous federal courts of appeals, and that this conflict warrants the Court's review of the issue. Pet. 17, 19. But the Secretary's position on the interpretation of section 202 provides an affirmative reason for this

Court to decline review of the question presented in this case.

Whatever the Secretary's prior position may have been in various orders, the Secretary recently proposed and requested comment on new regulations addressing the very issue of whether an actual or likely anticompetitive injury is necessary to violate subsections 202(a) and (b) of the PSA. See *Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act*, 75 Fed. Reg. 35,338 (proposed June 22, 2010). And in the Secretary's view, "the new regulations [on the very question presented in the petition] constitute a material change in circumstances that warrants judicial reexamination of the issue." *Id.* at 35,341. Although Tyson has demonstrated in comments on the proposed rules that the Secretary is bound to follow the holdings of the courts of appeals on the plain meaning of subsections 202(a) and (b), see, *e.g.*, *Armour*, 402 F.2d at 717, and therefore the proposed new regulations should be rejected, the Secretary's inchoate stance on the requirements of subsections 202(a) and (b) is an affirmative reason for this Court to decline review of the issue until that position has been solidified and the lower courts have considered it.

II. THE SIXTH CIRCUIT CORRECTLY HELD THAT A SHOWING OF ACTUAL OR LIKELY ANTICOMPETITIVE EFFECT IS NECESSARY TO STATE A CLAIM UNDER SUBSECTIONS 202(a) AND (b) OF THE PSA.

Unable to demonstrate a conflict that would warrant this Court's review, petitioner principally re-argues the merits of his appeal. These arguments,

however, do not merit review by this Court. The Sixth Circuit correctly concluded that subsections 202(a) and (b) require a showing of anticompetitive effect.

1. Petitioner's main quarrel with the Sixth Circuit's conclusion is his assertion that the court of appeals failed to read the language of subsections 202(a) and (b) according to its plain definitional meaning, so that these subsections stop all "unjustly discriminatory," or "deceptive" practices, and all "unreasonable preference[s]" by live poultry dealers without regard to any anticompetitive effect. 7 U.S.C. § 192(a), (b); Pet. 20-25. Contrary to petitioner's argument, the Sixth Circuit followed well established law on statutory interpretation. As this Court has instructed, the bare meaning "of words in isolation ... is not necessarily controlling in statutory construction." *Dolan*, 546 U.S. at 486. A word or phrase "may or may not extend to the outer limits of its definitional possibilities." *Id.* Proper statutory interpretation "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Id.*; see also *Norfolk Redevelopment & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983) ("'As in all cases of statutory construction, our task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve.'" (alterations in original) (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979)).

The context and purpose of the PSA prove that a showing of anticompetitive effect is necessary to state a claim under subsections 202(a) and (b). This Court has stated consistently that the PSA is an antitrust statute through which Congress intended to prevent anticompetitive behavior in the meat production and

processing industry. See *Mahon* v. *Stowers*, 416 U.S. 100, 106 (1974) (per curiam); *Stafford* v. *Wallace*, 258 U.S. 495, 514-15 (1922). In 1922, just one year after Congress passed the PSA, this Court stated that the "chief evil" the Act is designed to counter "is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys." *Stafford*, 258 U.S. at 514-15, 524-25. The Court explained that "what Congress had in mind primarily was to prevent" the type of antitrust "conspiracies" addressed in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905), "by supervision of the agencies which would be likely to be employed in it," *Stafford*, 258 U.S. at 520.

Unsurprisingly, given the PSA's antitrust aims, Congress used language in subsections 202(a) and (b) that originated in prior antitrust legislation and that had been interpreted by this Court to require a particular consideration of the effect of competition. In particular, the language in subsections 202(a) and (b) mirrors language in the Interstate Commerce Act of 1887, ch. 104, §§ 2, 3, 24 Stat. 379, 379-80, which prohibited "unjust discrimination" and "any undue or unreasonable preference or advantage." *Compare id.*, *with* 7 U.S.C. § 192(a), (b) (prohibiting "unfair, unjustly discriminatory, or deceptive practice or device" and "any undue or unreasonable preference or advantage"). By the time Congress enacted the PSA, this Court had interpreted these specific phrases of the Interstate Commerce Act to require a consideration of competition in assessing a violation of that Act. See *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 566, 567-68 (1919); *ICC* v. *Chi. Great W. Ry.*, 209 U.S. 108, 119, 122 (1908); *ICC* v.

Ala. Midland Ry., 168 U.S. 144, 164 (1897); *Texas & Pac. Ry.* v. *ICC*, 162 U.S. 197, 233 (1896).

The term "unfair" in subsection 202(a) similarly had its origins in antitrust legislation that required a consideration of competition in determining whether a violation had been committed. The Federal Trade Commission Act of 1914 ("FTCA"), ch. 311, § 5, 38 Stat. 717, 719, used the term "unfair," and the Supreme Court, just two years prior to the passage of the PSA, interpreted it as targeting practices that have a "dangerous tendency unduly to hinder competition or create monopoly," *FTC* v. *Gratz*, 253 U.S. 421, 427-28 (1920).[2]

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[2] Petitioner contends that the FTCA's use of "unfair" cannot demonstrate Congress's intention to target anticompetitive conduct because the FTCA uses "'unfair methods of competition,'" whereas the PSA addresses "'unfair ... device[s].'" Pet. 28. Petitioner's pursuit of identical phrasing continues to ignore the purpose and context of the PSA as legislation designed to target injuries to competition in the meat processing industry, not to mention Congress's specific reliance on *Gratz* in passing the PSA. *See* H.R. Rep. No. 67-77, at 2-10 (1921).

Amici—but not petitioner—argue erroneously that modern interpretations of the FTCA support their broad reading of subsection 202(a). Br. of *Amici* 12-13. This argument is incorrect for several reasons. First, interpretations of the FTCA after the passage of the PSA have no bearing on Congress's understanding of the term "unfair" when enacting the PSA. Two years before the passage of the PSA, this Court made clear that "unfair" as used in antitrust legislation targeted practices that hindered competition. Second, *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972), upon which *amici* rely, is inapplicable here. "Unlike the case" here, "the question in *Sperry and Hutchinson* was one of agency jurisdiction, namely whether § 5 empowered the FTC to define 'unfair practices' to include practices without anticompetitive effects and of a noncompetitive nature." *Been*, 495 F.3d at 1227 n.7.

Ultimately, the context, purpose, and language used in subsections 202(a) and (b) make clear that Congress intended to target only those practices that do or could adversely affect competition. This conclusion is reinforced by the presumption that Congress "knows and adopts the cluster of ideas that were attached to each borrowed word" from similar legislation. *Morrissette* v. *United States*, 342 U.S. 246, 263 (1952); see also *Moskal* v. *United States*, 498 U.S. 103, 121 (1990); *Carolene Prods. Co.* v. *United States*, 323 U.S. 18, 26 (1944).

These are the same "sound principles of statutory construction" that the court below found in the decisions of the courts of appeals that it followed. Pet. App. 14a. For instance, the Ninth Circuit specifically concluded that section 202 "incorporates the basic antitrust blueprint of ... other pre-existing antitrust legislation" and thus looked to decisions under that legislation for interpretive guidance. *De Jong Packing*, 618 F.2d at 1335 n.7. And as early as 1939, the Seventh Circuit had concluded that whether "preferences or discriminations are unreasonable" should be interpreted consistently between the PSA and the Interstate Commerce Act. *Swift & Co.*, 105 F.2d at 856. The Seventh Circuit later held that the terms "'unfair' and 'unjustly' in Section 202(a) and 'undue' and 'unreasonable' in Section 202(b)," with their antitrust ancestry, "enjoin the Department and courts to apply a rule of reason in determining lawfulness" under these sections. *Armour*, 402 F.2d at 717.

When read in context and according to the PSA's purpose, the prohibitions in subsections 202(a) and (b) require a plaintiff to plead and prove an anticompetitive effect from a defendant's challenged conduct.

2. Petitioner launches several attacks on this natural reading of the PSA. None is availing.

The nub of petitioner's argument that subsections 202(a) and (b) require no showing of an anticompetitive effect is that "subdivisions (c), (d), (e), and (f) [of section 202] explicitly refer to anticompetitive conduct" but (a) and (b) do not. Pet. 21. Contrary to petitioner's contention, however, the fact that other subdivisions of section 202 require a showing of anticompetitive conduct confirms that (a) and (b) require the same. A basic rule of statutory interpretation is that when "several items in a list share an attribute ... the other items" should be interpreted "as possessing that attribute as well." *Beecham* v. *United States*, 511 U.S. 368, 371 (1994); see also *Norton* v. *S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) ("the interpretive canon of *ejusdem generis* would attribute to the last item ... the same characteristic of discreteness shared by all the preceding items"). Because the prohibitions in subdivisions (c)-(e) relate only to conduct that has an anticompetitive effect, subsections (a) and (b) are properly read to do the same.

Nor does requiring an anticompetitive effect under subsections 202(a) and (b) make an absurdity of section 202. See Pet. 20-23. Rather, as the Tenth Circuit recognized, subsections (a) and (b) are catch-all prohibitions designed to capture all of the anticompetitive "acts that Congress could not, at the time of enactment, have foreseen and specified." *Been*, 495 F.3d at 1229.

Perhaps most important, petitioner's contrary construction would render most of section 202 superfluous. If subsections 202(a) and (b) are read—as petitioner proposes—to prohibit all activity that is "unfair, unjustly discriminatory, or deceptive," or that

provides any "undue or unreasonable preference or advantage," regardless of any anticompetitive harm, then these provisions would swallow all of the specific prohibitions in subdivisions (c) through (e), and much more. Petitioner's construction contravenes the fundamental rule that a statute should be read so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

Even worse, this construction would bring within the PSA, and the federal jurisdiction of district courts, issues that are purely matters of state law and that Congress could *not* have intended to fall within its purview. As the Eleventh Circuit recognized, "[f]ailure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised." *London*, 410 F.3d at 1304. Almost any economic practice can be considered subjectively unfair, undue, or unreasonable. Without requiring a showing that a practice harms competition, petitioner's broad reading of these terms would permit all such practices to be challenged under the PSA. But Congress did not intend to provide every farmer with an opportunity to convince a jury in federal court that his or her own beliefs about the economic unfairness of any particular action are correct, without any demonstration that these individual economic theories are related to preserving competition in the marketplace.

Petitioner also argues that Congress's subsequent amendments of the PSA support his expansive reading of the Act. Pet. 25-27. Not so. "'Congress is presumed to be aware of [a] ... judicial interpretation

of a statute and to adopt that interpretation when it reenacts a statute without change.'" *Lindahl* v. *Office of Personnel Mgmt.*, 470 U.S. 768, 782 n.15 (1985) (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975)); *accord Forest Grove Sch. Dist.* v. *T.A.*, 129 S. Ct. 2484, 2494 n.11 (2009). As petitioner notes (at 4), Congress has amended the PSA 23 times over its 90-year history, but it has remained silent on the showing necessary under subsections 202(a) and (b) in the face of numerous federal circuit court decisions interpreting these subsections to require a demonstration of an anticompetitive effect from challenged practices. As petitioner emphasizes (at 8, 26), Congress even extended the protections of section 202 to poultry sellers and growers, but did nothing to change the decisions of the courts of appeals requiring an actual or likely anticompetitive effect to establish a violation under subsections (a) and (b). The only permissible conclusion is that Congress intended to ratify this commonsense requirement, rather than make every activity that someone deems "unfair" the subject of a federal lawsuit.[3]

In an attempt to get around the clear antitrust ancestry and purpose of the PSA, petitioner argues *Stafford* does not clearly indicate "that anticompetitive conduct was the only evil to which those provisions could be applied." Pet. 25. Not true.

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[3] Petitioner contends that requiring a showing of anticompetitive effect under subsections 202(a) and (b) would nullify the prohibitions against the "unfair practices" of false weighing and failure promptly to pay poultry producers that Congress recently enacted. Pet. 26-27. This argument is baffling. Congress provided specific enforcement mechanisms for these offenses, mechanisms entirely separate from subsections 202(a) and (b). *See* 7 U.S.C. § 228b-2.

The Court upheld the PSA against a Commerce Clause challenge specifically because the PSA was aimed at monopolistic and anticompetitive activities. The Court found a sufficient effect on interstate commerce because "Congress has found an evil to be apprehended and to be prevented by the act here in question, in the use and control of stockyards and the commission men to *promote a packers' monopoly of interstate commerce*." *Stafford*, 258 U.S. at 524-25 (emphasis added). The PSA satisfied the Commerce Clause because the "act finds and imports this injurious direct effect of such agencies"—*i.e.*, those that promote a monopoly—"upon interstate commerce." *Id.* at 525.

Moreover, in the course of deciding this issue, this Court made clear that Congress designed the PSA specifically to combat anticompetitive conduct. While the Court noted that Congress intended to stop evils other than the "chief evil" that "is the monopoly of the packers," the other evils identified were "all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other." *Id.* at 514-15. And each of the other harms identified by the Court were anticompetitive in nature. As examples, the Court noted collusion, market players joining forces to impose an "undue burden on ... commerce" in the form of "exorbitant or unreasonable" charges, "duplication of commissions," and the "deceptive practices in respect of prices." *Id.* at 515.

Nothing in the Court's discussion suggests that the PSA or section 202 in particular extended beyond the anticompetitive concerns that motivated Congress to pass the Act. And the Court's decision certainly does not suggest—as petitioner contends—that Congress

intended to make every subjectively "unreasonable" or "discriminatory" practice a matter of federal law no matter how much it promotes healthy competition or how intrastate it may be.

Thus, petitioner is wrong in baldly asserting that the PSA "is not an antitrust law." Pet. 27. As *Stafford* and numerous courts of appeals have acknowledged, the PSA is just such a law. Nor does petitioner's citation to section 405 of the PSA support his assertion. As he acknowledges (at 27), that provision only states that the PSA will not "prevent or interfere with the enforcement of, or the procedure under" pre-existing antitrust laws. Packers and Stockyards Act, 1921, ch. 64, § 405, 42 Stat. 159, 168 (codified as amended at 7 U.S.C. § 225). That Congress had to address whether the PSA would interfere with other antitrust legislation supports the view that the PSA was aimed at addressing the same harm.

Petitioner also argues that reading the PSA according to its purpose of targeting practices that hinder competition will disregard the notion that the PSA was meant to be "'more than a mirror of the antitrust laws.'" Pet. 16. But as the Tenth Circuit explained, in requiring a showing that "a practice has injured or is likely to injur[e] competition," federal circuit courts "have not required a showing that the defendant engaged in the unfair practice with the intent to cause the injury or other unlawful effect," as required under antitrust laws. *Been*, 495 F.3d at 1231. A plaintiff need only show that "specific practices have the *effect* of injuring competition or are likely to do so." *Id.*

Finally, petitioner contends that requiring a plaintiff to show an anticompetitive effect will leave growers without any remedy for abusive practices. Pet. 18. This argument falls flat. Growers have no

shortage of state law remedies to cure perceived abuses. For instance, growers can resort to breach of contract claims. After all, petitioner contends that "the legal foundation" for an "enormous sector of the agricultural economy is the production contract." *Id.* at 16. Similarly, growers can turn to state laws that protect against abusive or deceptive business practices.

In sum, petitioner presents no basis for this Court's intervention, and the petition should be denied.

III. THE SECOND QUESTION PRESENTED WAS NOT PASSED ON BY THE COURT BELOW AND DOES NOT WARRANT CERTIORARI IN ANY EVENT.

The Court should decline to review the second question presented because the courts below did not pass on it, and because it seeks error correction that does not warrant this Court's attention.

1. Petitioner seeks review of the question whether, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the lower courts should have deferred to the Secretary of Agriculture's interpretation of subsections 202(a) and (b). Pet. i, 29. But neither the Sixth Circuit nor the district court passed on this issue, and "rais[ing] questions that were not decided by the court below .... is ordinarily fatal to the petition." Eugene Gressman et al., *Supreme Court Practice* 506 (9th ed. 2007). After all, "[i]t is the general rule ... that a federal appellate court does not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

As petitioner notes (at 33), the Secretary submitted an *amicus* brief before the Sixth Circuit advocating for *Chevron* deference. But petitioner, the party to

the appeal, only advocated for *Chevron* deference in a single sentence in his opening brief. See Final Br. of the Appellant at 14-15, *Terry* v. *Tyson Farms, Inc.*, No. 08-5577 (6th Cir. filed Oct. 9, 2008). Accordingly, the Sixth Circuit declined to pass on the issue, presumably having concluded that petitioner forfeited this argument by failing to raise it adequately in his briefs. See *Treesh* v. *Bagley*, 612 F.3d 424, 434 (6th Cir. 2010) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks omitted)). And having concluded that petitioner failed to raise this argument, the court presumably declined to reach an issue raised by an *amicus* but not the party it supports. *Bakal Bros., Inc.* v. *United States*, 105 F.3d 1085, 1090 (6th Cir. 1997) ("Because the argument" by an amicus "was not raised by plaintiff, we are not required to pass upon the claim."). Because the second question presented was not passed on by the lower courts, the Court should decline to review it.

2. In all events, petitioner's second question presented does not warrant this Court's review because it seeks mere error correction and is ultimately meritless.

Petitioner does not suggest that the courts of appeals are in conflict on whether the Secretary's interpretation of subsections 202(a) or (b) deserves *Chevron* deference. Nor can he. The federal circuit courts to address this specific issue have all held that *Chevron* deference is unwarranted. See *Wheeler*, 591 F.3d at 362; *London*, 410 F.3d at 1304; *Been*, 495 F.3d

at 1227.[4] Rather, he argues in essence that the Sixth Circuit erred in failing to defer to the Secretary's construction. Pet. 18, 29-31. But this Court does not sit as a court of error correction. See *Halbert* v. *Michigan*, 545 U.S. 605, 611 (2005).

The Court's review is also unwarranted because the Secretary's interpretation of subsections 202(a) and (b) is not entitled to *Chevron* deference. When "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. 842-43. As explained above, the plain language of subsections 202(a) and (b), in light of the context and purpose of the PSA, requires a showing of anticompetitive effect to state a claim. See *supra* pp. 16-26; see also *Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). Because Congress's intention is clear, there has been no delegation of authority to the Secretary that requires deference. *Chevron*, 467 U.S. at 841-42.

Moreover, contrary to petitioner's suggestion (at 31), this is precisely a situation in which a "court's prior judicial construction of a statute trumps an agency construction" because "the prior court decision [held] that its construction follows from the unambiguous terms of the statute and thus leaves no

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[4] As some of these courts have recognized, no *Chevron* deference is due to the Secretary's interpretation in part because Congress has not delegated authority to the Secretary to adjudicate violations of section 202 by live poultry dealers. *See, e.g.*, *London*, 410 F.3d at 1304.

room for agency discretion." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). In *Armour*, for example, the Seventh Circuit specifically held that the Secretary had "erroneously construed" subsections 202(a) and (b) of the PSA and that "the statutory language" of the Act "enjoin[ed] the Department and courts to apply a rule of reason." 402 F.2d at 717, 727. In other words, the court held that its conclusion followed from the unambiguous terms of the statute.[5]

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[5] Petitioner's concern (at 30) over a possible conflict between the courts' and Secretary's constructions of subsections 202(a) and (b) is no basis for certiorari. As explained above, the Secretary has initiated a rulemaking concerning its interpretation of subsections 202(a) and (b). *See supra* pp. 15-16. Moreover, on several occasions, the federal circuit courts have set aside the Secretary's interpretation of these subsections because the Secretary failed to construe them properly. *See, e.g.*, *Armour*, 402 F.2d at 727. The conflict arises from the Secretary's unwillingness to comply with the plain language of the PSA, not the courts' failure to give deference where it is due.

CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully yours,

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No. 10-542

In the Supreme Court of the United States

ALTON T. TERRY,

Petitioner,

v.

TYSON FARMS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

Petitioner, a poultry producer, sued in a federal district court under 7 U.S.C. §192(a) and (b), alleging violation of Packers and Stockyards Act ("PSA") regulations that grant poultry growers the right to be present when their production is weighed by live poultry dealers like Tyson Farms, Inc. The Sixth Circuit affirmed dismissal of the complaint on the ground that the regulation cannot be enforced unless the complaint alleges competitive harm to the entire broiler market. The PSA, however, has dual purposes: to protect competition and consumers, and to preserve fair, efficient and transparent markets for livestock and poultry producers. When provisions implementing these purposes do not overlap, they can be enforced independently. Section 192(a) and (b) was intended to assure that incipient and actual deception, bad faith, fraud, or unreasonable discrimination by processors against meat and poultry producers could not be used to gain price advantages in the highly concentrated meat industry. Congress banned all such conduct from the interstate marketplace without requiring a further showing of competitive harm.

1. a. Contrary to Respondent, the PSA is a regulatory statute, not an "antitrust law." Opp. 6, 25; Pet. App. 10a. No provision in it defines the PSA as an antitrust law, nor does the Clayton Act, 15 U.S.C. §12, the Interstate Commerce Act ("ICA"), 49 U.S.C. §10706, or the Federal Trade Commission Act ("FTCA"), 15 U.S.C. §44. Indeed, the PSA and the FTCA draw a clear line between PSA and FTCA jurisdiction. 7 U.S.C. §227(d); 15 U.S.C. §45(a)(2).

b. This Court has never held that the PSA is an antitrust law. In *Stafford v. Wallace,* 258 U.S. 495 (1922), the Court recognized that the PSA is much more. It was a response to abusive commercial practices by the oligopoly then dominating the meat packing business. The industry's lack of competition justified regulation of all packers operating in interstate commerce; the abusive trade practices justified the Act's special protections for producers. Packers were forbidden "to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, *or* to do any of a number of acts to control prices or establish a monopoly in the business." *Id.* at 513 (emphasis added). *Stafford* also held that commerce was unlawfully obstructed by "[a]ny unjust or deceptive practice or combination that unduly and directly enhances" the ability of the packers to "unduly and arbitrarily . . . lower prices to the shipper who sells, and unduly and arbitrarily . . . increase the price to the consumer who buys. . . ." *Id.* at 514-15.

c. Numerous cases recognize the PSA's origins in Sherman Act violations, but nevertheless hold that Congress intended the statute to be more than an antitrust law. *E.g. Spencer Livestock Comm'n v. USDA*, 841 F.2d 1451, 1455 (9th Cir. 1988) (the PSA "was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics."); *United States v. Perdue Farms, Inc.*, 680 F.2d 277, 280 (2d Cir. 1982) ("As originally enacted in 1921, the purpose of the [PSA] was to combat anticompetitive *and* unfair practices.") (emphasis added). *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) ("1968 *Swift*") ("[T]he statutory prohibitions of . . . the [PSA] are

broader and more far-reaching than the Sherman Act or even Section 5 of the [FTCA]."); *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) ("The legislative history showed Congress understood the sections of the [PSA] under consideration were broader in scope than antecedent legislation such as the Sherman Antitrust Act, sec. 2 of the Clayton Act, 15 U.S.C.A. § 13, sec. 5 of the [FTCA], 15 U.S.C.A. § 45 and sec. 3 of the [ICA], 49 U.S.C.A. § 3."). Even courts holding that competitive injury is a necessary element of a violation of 7 U.S.C. §192(a) and (b) have refrained from characterizing the PSA as an antitrust law per se. Instead, they have limited the reach of § 202(a) and (b) because, "[a]lthough intended to be broader than antecedent antitrust legislation," it also "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation." *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1228 (10th Cir. 2007) (quoting *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1335, n.7 (9th Cir. 1980)). The statement quoted from *De Jong*, however, addressed a conspiracy to rig the livestock market: "What is charged as unfair is the attempt to coerce a change in marketing practices by concerted action . . . to obtain a favorable change in marketing practices that could not have resulted from the free play of competitive forces." *De Jong*, 618 F.2d at 1335. As the *De Jong* court noted, "decisions under the Sherman Act are germane to the issues before us." *Id.* *De Jong's* application of Sherman Act precedents to a PSA case involving a conspiracy to restrain trade in the livestock industry, however, does not compel the conclusion that only violations sounding in antitrust law can be remedied under §192(a) and (b) of the PSA. This is shown by the Ninth Circuit's subsequent decision in *Spencer Livestock*.

2. Respondent mistakenly asserts that Petitioner claims no conflict, and that *Spencer Livestock* is inapplicable because it involves a different provision of the PSA, 7 U.S.C. §213. Opp. 6, 13. Section 213, however, is parallel to §192(a) and (b) because it prohibits "any unfair, unjustly discriminatory, or deceptive practice" in the purchase and sale of livestock by market agents. *See* Pet. 19, 24; see also 7 U.S.C. §§228b(c), 228b-1(b) (defining delayed payment to producers as "unfair" without regard to competitive effects). Also mistaken is Respondent's contention that any tension between *De Jong* and *Spencer Livestock* presents only an intra-circuit matter. Opp. 14, n.1. There is none. *De Jong* involved concerted efforts to coerce changes in marketing practices. *Spencer Livestock* involved classic fraudulent behavior and violation of PSA regulations intended to prevent it. The Department of Agriculture found that a livestock marketing agent had violated § 213 and implementing regulations by using false weights and shrinkage allowances. On judicial review, the agent contended that it could not be held liable because none of its sales exceeded the prevailing market price, so that consumers were not harmed, nor was any anti-competitive effect proven. Looking to the PSA's objectives, and consistent with *Stafford v. Wallace,* the Ninth Circuit ruled that the Act is aimed not only at preserving fair competition, but at "protect[ing] the livestock market from unfair and deceptive business tactics." *Spencer Livestock*, 841 F.2d at 1455.

3. a. The decision below undermines the PSA's purpose to protect upstream suppliers in meat and poultry markets from actual and incipient unfair, deceptive, fraudulent and unreasonably discriminatory

practices. The petition (at 20-25) and the supporting amicus brief of 55 Farming, Ranching and Consumer Organizations (at 14-18) demonstrate that reading a competitive injury requirement into §192(a) and (b) violates basic principles of statutory construction. The consequences of this error ripple across the nation's meat supply because they defeat Congress's continuous efforts to provide federal remedies for unfair, deceptive, fraudulent and unreasonably discriminatory practices in livestock and poultry markets. Poultry growers who must deal with the intensely concentrated processor side of the industry are particularly hard hit because they have no recourse for damages under the PSA except an action in federal district court of the kind barred by the decision below.

b. The Sixth Circuit's decision fails to give due weight to the 1935, 1958, 1987 and 2008 Amendments to the PSA, which were intended to strengthen protection for livestock and poultry producers. See Pet. 6-10, 25-27. Those amendments are guides to the dual purposes of the PSA, and Congress's intent in the PSA to provide protection for producers independent of competitive impact. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 783 n.17 (1992) ("When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.") *Accord, Tiger v. W. Inv. Co.*, 221 U.S. 286, 309 (1911); *NLRB v. Bell Aerospace Co. of Textron, Inc.*, 416 U.S. 267, 275 (1974); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-381 (1969); *United States v. Stafoff*, 260 U.S. 477, 480 (1923) (opinion of Holmes, J.). For example, in § 11004(a)(1) of the 2008 Farm Bill (the Food, Conservation and

Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651, 2117 (2008), Congress again recognized the PSA's line between financial, trade practice and competitive violations. It added a new provision to the Act, §416 (7 U.S.C. §229), requiring the Secretary to submit annually a report stating "for the preceding year, *separately for livestock and poultry and separately by enforcement area category (financial, trade practice or competitive acts and practices)*, with respect to investigations into possible violations of this Act--- . . . ." 122 Stat. 2117. The new §416 clearly reflects the understanding of Congress that the PSA deals separately with financial practices, trade practices, and competitive practices.

c. In the poultry amendments to the PSA, Congress expressly described the evils to be remedied: rampant oppressive, deceptive, prejudicial, and fraudulent practices in the poultry market that led to producers receiving prices far below the true value of their poultry. The 1935 amendment almost literally restated *Stafford v. Wallace*'s observations about the 1921 Act: "such practices . . . are an undue restraint and unjust burden upon interstate commerce." 49 Stat. 648. In 1921 and in repeated amendments to the PSA, Congress condemned such abuses without regard to their ultimate impact on competition and consumer prices.

4. a. The construction of §192 below is inconsistent with cases holding that deceptive weighing and similar fraudulent practices violate the PSA. It fails to distinguish between cases in which the conduct involved was allegedly anticompetitive, and those which involved deception, fraud, and unreasonable discrimination or PSA rules. The lower

courts overlooked the PSA's dual purposes. They lumped all of the cases together, putting violation of regulations intended to prevent deceptive weighing beyond the PSA's reach unless competition and consumers were harmed. In effect, they invite processors in this highly concentrated industry to compete by oppressing their producers.

b. Respondent contends that the competitive injury requirement originated in *Swift v. Wallace*, 105 F.2d 848 (7th Cir. 1939) ("1939 *Swift*") and was "solidified" in *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968). Opp. 8-9. Both cases, however, involved allegedly anticompetitive practices. *Armour* simply explained that "the [1939 *Swift*] Court observed that discriminatory action 'necessarily resulting in injury' to competitors would appear to violate Section 202(a) of the Act." 402 F.2d at 722. *Armour* also preserved the distinction between the PSA's provisions protecting growers from abuse, and those protecting consumers:

> Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed "unfair" by the Federal Trade Commission . . . *and* also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic.

Id. (citation omitted; emphasis added). As applied to such "special mischiefs and injuries," the Seventh Circuit has never disavowed its holding in 1968 *Swift* that "[§ 192] does not require the Government to prove injury to competition. The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and

consumers at the expense of middlemen." 393 F.2d 247, 253 (citations omitted). Such "mischiefs and injuries" have been, and continued to be independent violations of the PSA under the 1935 addition of poultry dealers to §192, the 1958 addition of poultry and poultry products to §192, and in the federal judicial remedy for poultry growers added by the 1987 Poultry Act that displaced the 1935 Act. Such abuses have also been the basis of decisions directed at false weighing and violation of anti-fraud regulations in cases like *Spencer Livestock*; *Parchman v. USDA*, 852 F.2d 858, 864-65 (6th Cir. 1988); and *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972), *judicial vacation of administrative remedy reversed sub nom., Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973).[1]

5. Respondent's contention that a judicially-imposed competitive injury requirement is necessary to prevent displacement of state law is unsound. Opp. 22. The PSA embodies Congress's decision to create federal remedies establishing liability for individual violations. Such remedies are in addition to existing common law and statutory remedies. 7 U.S.C. §209(b). State law remedies are therefore not displaced; rather,

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[1] *Mahon v. Stowers*, 416 U.S. 100 (1974) is not inconsistent. That case concerned priorities in the bankruptcy of a meat packer. It held only that neither §192, nor regulations requiring prompt payment and the keeping of grade-and-weight records supported imposition of a trust conferring priority on the seller over other creditors. The Court saw no indication in §192's "intention to control deceptive and monopolistic practices in the packing industry," a further intention to provide such a benefit. *Id.* at 107-09. The case did not hold that deceptive practices can be remedied only if monopolistic practices are proved.

Congress intended §192 to be a broader federal alternative to state law, which typically does not reach incipient fraud. *See e.g. Braswell v. Conagra, Inc.*, 936 F.2d 1169 (11th Cir 1991) (false weighing claims applying Alabama law of contract and fraud). Respondent's assertion that dealers would be subject to "liability under the PSA for simple breach of contract or for justifiably terminating a contract" (quoting *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005)) makes no legal sense. Contract claims involving only simple breach or justifiable termination do not fall within the conduct remediable under §192(a) and (b), and both the courts and the Secretary of Agriculture can recognize the distinction. *London* is inconsistent with Congress's legislative choice and the PSA's dual purposes.

6. Cases holding that competitive injury is necessary to a §192 violation assert a groundless concern: that without such a limitation the statute lacks judicially ascertainable standards and limitations. This concern ignores the role of the Department of Agriculture's implementing regulations in aiding the courts to identify false weighing, deception, fraud, and other incipient and realized forms "of the special mischiefs and injuries inherent in livestock and poultry traffic." *Armour & Co.*, 402 F.2d at 722. It also disregards the origins of terms like "unfair" or "unreasonable" as they appear in the PSA. In 1939 *Swift* the Seventh Circuit analyzed "unreasonable discrimination" in §192. It observed that: "'Unreasonable' is not a word of fixed content and whether preferences or advantages are unreasonable must be determined by an evaluation of all cognizable factors which determine the scope and nature of the preference or advantage." 105 F.2d at

854-55. Then, after reviewing cases defining unreasonable preference under the FTCA and ICA, it held:

> We believe that it is well within the discussion and reason found in the opinions in the foregoing cases to say that actual competition carried on in good faith by normally fair methods *not "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression * * *"* is a fact which must be given substantial weight in determining whether preferences or discriminations are unreasonable within the meaning both of the Interstate Commerce Commission Act and the Packers and Stockyards Act.

Id. at 856 (footnote omitted; emphasis added). The italicized quote above is from *FTC v. Gratz*, 253 U.S. 421, 427-428 (1920). *Gratz*'s restriction to "heretofore regarded" abuses was later overruled. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). These cases show, that the courts know how to confine §192(a) and (b) in light of the PSA's dual purposes and administrative constructions, as well as embedded legal traditions that seek to keep the marketplace free from abuses and deception, including the risk of false weighing. *See Leviticus* 19:36. Further guidance comes from the Secretary of Agriculture's primary jurisdiction to enforce the Act. Although he cannot award damages or reparations for violation of §192, he has authority under 7 U.S.C. §210(c) to investigate anything as to which a complaint may be filed, "or concerning which any question may arise" under the Act. In such inquiries, §210(c) further authorizes the

Secretary to proceed on his own motion as if a complaint had been filed, and to issue any appropriate order, "except orders for the payment of money."

7. If §192 is ambiguous, the courts should defer to the Secretary of Agriculture's construction. Respondent acknowledges that the Petitioner's alternative second question was presented in the court of appeals in the opening brief and in the brief of the United States as amicus curiae. Opp. 26. It argues, however, that the Secretary has no authority to enforce §192 against poultry dealers. Opp. 28, n. 4. As shown above, that argument confuses the Secretary's lack of authority to award reparations or damages with his much broader authority under §210(c) to issue any order except for the payment of money. The deference issue is therefore properly before the Court if it deems §192 ambiguous.

8. The United States' role as amicus curiae in three recent appellate cases construing §192 shows that the Court would benefit by having the Secretary of Agriculture's views placed before it. Pet. 33, n.25 Tyson urges the Court to deny review because of a pending proposal to codify into a regulation the views of successive Secretaries of Agriculture that competitive injury is not a necessary element of liability under §192(a) and (b). Whether that codification would accomplish a meaningful "material change" is itself a reason to request the views of the United States.

CONCLUSION

This case impacts every meat and poultry producer in the nation. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ALTON T. TERRY,

Petitioner,

v.

TYSON FARMS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF 55 FARMING, RANCHING, AND CONSUMER ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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H.R. REP. NO. 85-1048 (1957) 1, 8

OTHER AUTHORITY

AM. BAR ASS'N, Antitrust Law Developments (6th ed. 2007) 8

AM. ANTITRUST INS'T, The Next Antitrust Agenda (Albert A. Foe red., 2008) 6

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) 14, 17

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Christopher Bass, *More than a Mirror: the Packers and Stockyards Act, Antitrust Laws, and the Injury to Competition Requirement*, 12 DRAKE J. AGRIC. L. 423 (2007) 8

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Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meatpacker Relationships*, 8 DRAKE J. AGRIC. L. 91(2003) 8, 9, 14

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Nigel Key & James M. McDonald, *Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey*, Presented at the Annual Meeting of the Agricultural and Applied Economics Association (July 27-29, 2008) 5, 7

Note, *Challenging Concentration of Control in the American Meat Industry*, 117 HARV. L. REV. 2643 (2004) 9

Peter Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers*, 53 ANTITRUST BULL. 271 (2008) 6

Public Workshop Exploring Competition in Agriculture: Poultry Workshop, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF AGRIC. (May 21, 2010) 4

Steve W. Martinez, *Vertical Coordination in the Pork and Broiler Industries: Implications for Pork and Chicken Products*, FOOD AND RURAL ECONOMICS DIVISION, ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, AGRIC. ECONOMICS REPORT NO. 777 (1999) 5

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William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and its Modern Awakening*, 5 J. AGRIC. & FOOD INDUS. ORG., Article 4 (2004) 7, 9

INTEREST OF AMICI CURIAE[1]

The current question before this Court is an issue of critical national importance and will determine the effectiveness of the Packers and Stockyards Act (PSA) in meeting its central goal of creating fair, open, efficient, and transparent markets for livestock. *See* H.R. REP. NO. 85-1048, at 2 (1957). Recent court decisions have ignored the plain language and intent of the Act by grafting an anticompetitive injury requirement on its remedial provisions, thereby treating the Act as if it were another antitrust law rather than a law designed to prevent a myriad of abuses in agricultural markets.

The amici are 55 farming, ranching and consumer groups, that represent more than 400,000 farmers and ranchers nationwide, and are actively engaged in advocating for free and competitive agricultural markets. The National Farmers Union, with a membership of 250,000 farm and ranch families, works to protect and enhance the economic interests and quality of life of family farmers and ranchers and

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[1] Pursuant to Supreme Court Rule 36.7 amici state that: 1) this brief draws from an amicus brief presented in the Fifth Circuit in *Wheeler v. Pilgrim's Pride, infra,* p. 12, and Prof. Peter Carstensen, counsel for the petitioner here, assisted in the drafting of the *Wheeler* brief; and 2) no person or entity other than the amici, their members and counsel have made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3 the parties were provided with at least 10 days notice of amici's intention to file and all parties have consented to the filing of this brief and such consents are lodged herewith.

rural communities. The Rural Advancement Foundation International – USA (RAFI-USA) cultivates markets, policies and communities that support thriving, socially just, and environmentally sound family farms. The Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF USA") is a national non-profit cattle association representing thousands of U.S. cattle producers in 46 states on issues concerning international trade and marketing to ensure the profitability and continued viability of independent U.S. cattle producers. The Organization for Competitive Markets is a national, non-profit, public policy research organization that works to help return the food and agricultural sector to true supply-demand based competition through competitive markets. The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. AAI believes that because there are limits to what antitrust can be expected to achieve, Congress has the authority to impose market-facilitating statutes that do not necessarily incorporate antitrust doctrines. Amici are all actively engaged in advocating for free and competitive agricultural markets, and believe that granting the Petition for Writ of Certiorari is a crucial step in maintaining the integrity of the Packers and Stockyards Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

The PSA was designed by Congress to be broader than the antitrust legislation preceding it because of the nature of abuses in agricultural markets, and the inability of standard antitrust law to effectively rein in these abuses. Classic tenets of statutory construction require a plain reading of sections 192(a) and (b) of the PSA to prevent unfair practices that harm farmers. Grafting onto these provisions a requirement to demonstrate an adverse impact on competition will severely restrict the ability to bring actions under the PSA, and undermine congressional intent to ensure fair and competitive livestock markets. The unique nature of abuses by highly concentrated buyers in agricultural markets, and in particular the broiler market, only underscores the necessity of Court review to clarify that there is no unwritten requirement of demonstrating competitive injury in the PSA.

ARGUMENT

I. CURRENT MARKET CONDITIONS MAKE INTERPRETATION OF THE PSA A CRITICAL ISSUE OF NATIONAL IMPORTANCE

The PSA is of vital importance now more than ever because of the increasing concentration of meat processing markets. Both the legislative and executive branches have demonstrated that increasing

market concentration is a crucial public policy concern. In 2010, the United States Department of Justice and the Department of Agriculture (USDA) embarked in a precedent-setting joint effort to examine competition in agriculture. In a series of hearings attended by thousands of farmers, the enforcement agencies heard from hundreds of farmers and received over 15,000 public comments. The hearings addressed the crisis in agriculture markets resulting from increased processor concentration, which has led to decreased compensation for farmers, forcing thousands of farmers out of business.[2]

Nowhere is this crisis as stark as in the broiler market. As USDA Secretary Vilsack observed "in 1963 the top four firms controlled 14% of chickens slaughtered, today it is roughly 57%. . . . [I]t is not uncommon for a grower to have to do business with **only one** company in their area." *Public Workshop Exploring Competition in Agriculture: Poultry Workshop*, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF

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[2] Congress has expressed similar concerns. In 2008, the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Committee conducted a hearing on concentration in agriculture because of the concerns that increased consolidation results in "reduced market opportunities, possible anti-competitive and predatory business practices, and fewer choices and higher cost for American consumers." *Concentration in Agriculture and an Examination of the JBS/Swift Acquisitions: Hearing Before the Subcomm. On Antitrust, Competition Policy and Consumer Rights*, 110th Cong. 3 (2008) (statement of Sen. Grassley, Member, Sen. Comm. on the Judiciary).

AGRIC. 11 (May 21, 2010), *available at* http://www.justice.gov/atr/public/workshops/ag2010/alabama-ag workshop-transcript.pdf (hereinafter *Poultry Workshop*) (emphasis added). The broiler industry has been transformed from an industry once consisting of millions of flocks to one consisting of "less than 50 specialized, vertically integrated agribusiness firms." NAT'L AGRIC. STAT. SERVICES, U.S. DEP'T OF AGRIC., U.S. Broiler Industry Structure (2002).

Other economic studies have confirmed that processing in the broiler industry is highly concentrated and this makes the market susceptible to abusive practices and reduced compensation for growers. *See, e.g.*, Steve W. Martinez, *Vertical Coordination in the Pork and Broiler Industries: Implications for Pork and Chicken Products*, FOOD AND RURAL ECONOMICS DIVISION, ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, AGRICULTURAL ECONOMICS REPORT NO. 777 (1999). A preliminary study performed by two USDA economists found that growers with a single integrator in their area receive nearly 7% less in fees than those growers with four or more companies in their area. Nigel Key & James M. McDonald, *Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey* at 2, Presented at the Annual Meeting of the Agricultural and Applied Economics Association (July 27-29, 2008), *available at* http://ageconsearch.umn.edu/bitstream/6073/2/sp08ke30.pdf.

Processor concentration has driven farmers from the market in other meat markets. Secretary Vilsack noted the number of hog farms has declined from 666,000 farms in 1980 to roughly one-tenth of that today: 67,000, and the number of cattle farms declined from 1.6 million to roughly 950,000 during this same period, representing a loss of over 600,000 cattle farms in just the past three decades. *Poultry Workshop* at 5.

As explained in a report of the American Antitrust Institute, the diminishing opportunities for farmers and ranchers are due to a dramatic increase in concentration at the processing level. AM. ANTITRUST INS'T, THE NEXT ANTITRUST AGENDA, 290-305 (Albert A. Foer ed., 2008). This report documents the critical lack of competition in numerous agriculture processing markets and notes that the USDA failed to fully implement the PSA's enforcement provisions or "make any effort to protect vulnerable growers from exploitation." *Id.* at 310. Relevant to this matter, the report demonstrates that contracts forced upon poultry producers often contain a variety of exploitative and abusive conditions. *Id.*

The antitrust laws are often inadequate to police abusive or harmful conduct by powerful buyers. Harms from buyer power extend beyond direct effects on "upstream" or "downstream" competition as traditionally understood in antitrust law. Buyers in a highly concentrated market have great discretionary power in markets where there are many sellers and few buyers. *See* Peter Carstensen, *Buyer Power,*

Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers, 53 ANTITRUST BULL. 271, 289 (2008). Discretionary power can be used to harm individual producers by exclusion from the market, discriminatory practices, or undue favoritism. *Id.* at 297-302. This is currently happening in the broiler industry, where broiler processing firms, such as Tyson Farms, can exercise their power in an abusive manner because the localized nature of the production complexes limit the integrators with whom sellers can contract. Key & McDonald at 3.

Proper interpretation of the PSA is vital to protect farmers and ranchers from abusive and deceptive practices of processors, especially in those markets dominated by a few buyers. Many of these practices in broiler markets, such as delayed weighing of poultry, denying producers access to the weighing process, delivering diseased poultry or misleading representations may not rise to the level of an antitrust violation. Yet the purpose of the PSA was to prevent these abusive practices by powerful buyers in highly concentrated agricultural processing markets. *See* William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and its Modern Awakening*, 5 J. AGRIC. & FOOD INDUS. ORG., Article 4 at 1-2 (2004).

As Congress recognized when the PSA was enacted in 1921, the antitrust laws are inadequate to protect farmers and ranchers from exploitation. Since then the law has become clear that the antitrust laws require a showing that conduct harms the

competitive process, not merely exploits market power lawfully obtained. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Moreover, even when competition is adversely affected, it is sometimes extremely difficult to prove. *See* AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 809-37 (6th ed. 2007) (describing the costs and complexities of demonstrating an adverse effect on competition under the antitrust laws). The PSA was an explicit effort to protect farmers from the abuses of the use of buyer power inherent in agricultural markets where Congress deemed the antitrust laws to be insufficient. *See* Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meatpacker Relationships*, 8 DRAKE J. AGRIC. L. 91, 93-94 (2003); *see also* Christopher M. Bass, *More than a Mirror: the Packers and Stockyards Act, Antitrust Laws, and the Injury to Competition Requirement*, 12 DRAKE J. AGRIC. L. 423, 428 (2007) (discussing historical context in which the PSA was adopted).

II. THE PSA IS BROADER THAN THE SHERMAN AND CLAYTON ACTS

The primary purpose of the PSA is "to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry." H.R. REP. NO. 85-1048 (1957). When Congress passed the PSA, it was primarily motivated to protect farmers from abusive and deceptive practices by powerful

livestock buyers. Stumo & O'Brien at 91-92. The goal was to enact a broad statute similar to Section 5 of the Federal Trade Commission Act that would give farmers and the USDA the power to challenge abusive and unfair practices that could not be effectively challenged under the Sherman and Clayton Acts. Congress enacted the statute because the antitrust statutes had failed to remedy the ongoing unfair and deceptive conduct in the market. Rosales at 6-10; Note, *Challenging Concentration of Control in the American Meat Industry*, 117 HARV. L. REV. 2643, 2657 (2004).

The PSA was intentionally designed to be broader than its analogous antitrust laws, the Sherman and Clayton Acts. *See* C. Robert Taylor, *Buyer Power Litigation in Agriculture: Pickett v. Tyson Fresh Meats, Inc.*, 53 ANTITRUST BULL. 455, 456-57 ("[The PSA] was intended to go much further than the Sherman and Clayton Acts to protect livestock producers (the sellers) from various unfair and anticompetitive practices by meatpackers (the buyers). . . ."). The text of the statute itself states this explicitly, noting that the private right of action under the PSA: "shall not in any way abridge or alter remedies now existing at common law or by statute, ***but the provisions of this chapter are in addition to such remedies***." 7 U.S.C. § 209(b) (emphasis added). This Court confirmed a broad construction of this statute in *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922):

> The chief evil feared [by the PSA] is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys. . . . Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. ***Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce***.

(emphasis added). More recent case law has confirmed the role of the PSA to combat a broad range of unfair and anticompetitive practices. *See United States v. Perdue Farms, Inc.*, 680 F.2d 277, 280 (2d Cir. 1982) ("As originally enacted in 1921, the purpose of the [PSA] was to combat anticompetitive ***and*** unfair practices.") (emphasis added).

The Department of Justice in this case and in earlier cases under the PSA agrees that Congress intended for the PSA to cover practices that were not violations of the antitrust laws and that it is inappropriate to require a showing of competitive harm. *See* Brief for the United States of America as Amicus Curiae Supporting Plaintiffs-Appellees at 13, Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355 (5th Cir. 2009) (No. 07-40651).

III. THE SIXTH CIRCUIT MISCONSTRUED THE PSA BY CONFLATING PSA STANDARDS WITH ANTITRUST STANDARDS USED UNDER THE SHERMAN AND CLAYTON ACTS

The PSA was enacted years after the Sherman Act and the watershed moment in its jurisprudence, *Standard Oil Co. of New Jersey v. United States*, which interpreted section 1 of the Act to bar only agreements that "unreasonably" restrain trade. 221 U.S. 1 (1911). The PSA's broader nature was indeed a direct response to the inability of the previous antitrust legislation to effectively curtail unfair or deceptive practices in the meatpacking industry:

> [S]ection 2 of the Clayton Act, section 5 of the Federal Trade Commission Act and the prohibitions in the Sherman Anti-Trust Act were not broad enough to meet the public needs as to business practices of packers. Section [192](a) and (b) was enacted for the purpose of going further than prior legislation in the prohibiting of certain trade practices which Congress considered were not consonant with the public interest.

Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961).

The Sixth Circuit below narrowly construed the PSA to be consistent with the antitrust laws notwithstanding that the statute was specifically designed to broaden the scope of culpability where antitrust legislation was too narrow. In holding that § 192(a)

and (b) require an anticompetitive effect, the court conducted no independent analysis but rather relied wholly on the supposed unanimity of the circuits because "the rationale employed by our sister circuits is well-reasoned and grounded on sound principles of statutory construction." Brief for Petitioner, App. 14a. Without reviewing any of the relevant arguments, the court followed the Fifth Circuit's reasoning that because "the purpose of the Packers and Stockyards Act . . . is to protect competition, . . . only those practices that will likely affect competition adversely violate the act." *Id.* at 11a (quoting *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 357 (5th Cir. 2009) (en banc) (9-7 vote)).

However, the Fifth Circuit, and the other circuits that have followed the same reasoning, are wrong; among other things, they have ignored that this Court expressly held with respect to Section 5 of the Federal Trade Commission Act, a similarly broad unfairness statute. Like the PSA, the FTC Act was passed in order to *supplement* previous antitrust laws by prohibiting a broader category of unfair and anticompetitive practices: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1). In *FTC v. Sperry & Hutchinson, & Co.*, the FTC held that Sperry had violated the FTC Act by attempting "to suppress the operation of trading stamp exchanges." *Sperry*, 405 U.S. 233, 234 (1972). Sperry challenged the holding and the Fifth Circuit agreed with Sperry

holding that the "FTC could halt only conduct that violated either the letter or the spirit of the antitrust laws." *Id.* at 235. This Court however reversed that holding and held that "unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior." *Id.* at 244. *See also Been v. O.K. Indus. Inc.*, 495 F.3d 1217, 1240 (10th Cir. 2007) (Hartz, J., concurring and dissenting) (Discussing how the PSA is an "offspring of the FTC Act" and broader than the antitrust laws.)

In *Sperry*, this Court faced the very issue posed in this case – whether to graft on a requirement of showing an adverse effect on competition on a broad statute condemning unfair practices. This Court rejected that proposition, holding that the FTC Act proscribes "practices as unfair or deceptive in their effect upon consumers ***regardless of their nature or quality as competitive practices or their effect on competition***[.]" *Sperry & Hutchinson*, 405 U.S. at 239 (emphasis added). There is no requirement of effect on competition in the FTC Act because "[t]he point where a method of competition becomes 'unfair' within the meaning of the [FTC] Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question." *FTC v. Motion Picture Adver. Co.*, 344 U.S. 392, 396 (1953).

Like the FTC Act, the PSA proscribes acts that would not be illegal under other antitrust legislation. *See Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) ("[s]ection 202(a) [i.e., 192(a)] should be read liberally enough to take care of the types of anticompetitive practices properly deemed 'unfair' by the Federal Trade Commission . . . and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic."); *see also Swift & Co. v. United States*, 393 F.2d 247 (7th Cir. 1968); *see also* Stumo & O'Brien at 93-97 (discussing the added breadth of the PSA in terms of micro [unfairness] and macro [antitrust] effects). Thus, any requirement that a plaintiff prove an adverse effect on competition is inconsistent with the purposes of the statute.

IV. STATUTORY CONSTRUCTION RULES REQUIRE A PLAIN READING OF §§ 192(a) AND (b)

Courts should "resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). Resolving statutory ambiguities without a solid textual anchor makes a court's "pronouncement[s] appear[ ] uncomfortably like legislation." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). Justice Scalia's reasoning is well supported:

"courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that 'when a statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'").

"[T]he starting point in any case involving the meaning of a statute[ ] is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). The language at issue here from the Packers and Stockyards Act, 7 U.S.C. §§ 192(a)-(b), is unambiguous and clear:

> It shall be unlawful . . . for any live poultry dealer with respect to live poultry to: (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

7 U.S.C. § 192(a)-(b). Judge Garza in his dissent in *Wheeler* correctly noted that neither Section 192(a) or (b) contain language that would limit its application only to acts that have an adverse effect on competition. *Wheeler*, 591 F.3d at 374 (Garza, J., dissenting).

Further, Congress did place language requiring an adverse effect on competition in other subsections of § 192, which is further evidence that no adverse effect on competition is required in subsections (a) and (b). *See* 7 U.S.C. § 192(c) (" . . . if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly."); 7 U.S.C. § 192(d) (" . . . or with the effect of manipulating or controlling prices, or of creating a monopoly . . . or of restraining commerce."); 7 U.S.C. § 192(e) (" . . . or with the effect of manipulating or controlling prices, or of creating a monopoly . . . or of restraining commerce."). "'Where Congress includes particular language in one section of a statute but omits it in another section of the same [a]ct, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *see also Wheeler*, 591 F.3d at 374 (Garza, J. dissenting) (if Congress intended to limit the scope of § 192(a)-(b) it would have included language to do so).

The other opinions relied upon below ignored the strict standards of statutory construction and attempted to read into the PSA antitrust provisions which simply are absent. For example, in *Been*, the court found the PSA's antitrust background as reason to read a requirement of adverse effect on competition. *Been at* 1229. In *London*, the court reached the same conclusion by relying on the PSA's legislative history, "antitrust ancestry," and "policy considerations." *London v. Fieldale Farms Corp.*, 410 F.3d

1295,1307 (11th Cir. 2005). Both decisions are incorrect as to the legislative intent, but in any case fall into the trap Justice Scalia warns of above, and make decisions "appear[ ] uncomfortably like legislation." Scalia at 1185.

Numerous district courts have followed the instructions to rely on the plain language of the statute. The Northern District of Iowa noted that: "only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive' within the meaning of § 192(a) must *also* be 'monopolistic' or 'anticompetitive' to be prohibited." *Kinkaid v. John Morrell & Co.*, 321 F. Supp. 2d 1090, 1103 (N.D. Iowa 2004). *See also Schumacher v. Tyson Fresh Meats, Inc.*, 434 F. Supp. 2d 748, 754 (D.S.D. 2006) ("7 U.S.C. § 192(a)[ ] does not prohibit only those unfair and deceptive practices which adversely affect competition."); *White v. Pilgrims' Pride Corp.*, 2008 WL 4471656 (E.D. Tex. Sept. 29, 2008) (ruling that plaintiff need not prove an adverse effect on competition under § 192(a)-(b)); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465 (N.D.N.Y 1984) (dismissing argument that § 192(a) required a showing of restraint on trade or competition).

"[Congress] does not . . . hide elephants in mouse holes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). By reading an adverse competitive effect into sections 192(a)-(b), courts have spotted an elephant in this mouse hole. This Court's own precedent is that courts cannot take the place of Congress

in deciding matters of policy. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978).

CONCLUSION

We respectfully request that the Court grant the petition for a Writ of Certiorari.

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AMICI LIST

Alabama Contract Poultry Growers Association

Alaska Farmers Union

American Agriculture Movement

American Antitrust Institute

American Grassfed Association

California Farmers Union

Campaign for Contract Agriculture Reform (CCAR)

Center for Food Safety

Citizens for Private Property Rights (MO)

Colorado Independent Cattle Growers Association

Contract Poultry Growers Association of the Virginias
Farm and Ranch Freedom Alliance

Food & Water Watch

Hispanic Organizations Leadership Alliance

Idaho Farmers Union

Illinois Farmers Union

Independent Beef Association of North Dakota
(I-BAND)

Independent Cattlemen of Nebraska

Independent Cattlemen of Wyoming

Indiana Farmers Union

Institute for Agriculture and Trade Policy

Iowa Farmers Union

Island Grown Initiative

Kansas Cattlemen's Association KS

Kansas Farmers Union

Michigan Farmers Union

Midwest Environmental Advocates

Mississippi Livestock Markets Association

Missouri Farmers Union

National Catholic Rural Life Conference

National Family Farm Coalition

National Farmers Organization

National Farmers Union

National Latino Farmers & Ranchers Trade Association

National Sustainable Agriculture Coalition

Nebraska Farmers Union

Nevada Live Stock Association

New England Farmers Union

North Carolina Contract Poultry Growers Association

North Carolina Environmental Justice Network

Ohio Farmers Union

Oregon Rural Action

Organic Consumers Association

Organization for Competitive Markets

Pennypack Farm & Education Center

Powder River Basin Resource Council

R-CALF United Stockgrowers of America

Rural Advancement Foundation International, USA (RAFI-USA)

South Dakota Stockgrowers Association

Texas Farmers Union

United Poultry Growers Association

Utah Farmers Union

Virginia Association for Biological Farming

Western Organizations of Resource Councils (WORC)

Wisconsin Farmers Union